Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 197_

NO. ____ 78-1832

JULIUS T. CUYLER, SUPERINTENDENT

AND

DISTRICT ATTORNEY OF PHILADELPHIA,
PETITIONER

V.

JOHN SULLIVAN, RESPONDENT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-1411

UNITED STATES OF AMERICA ex rel.
JOHN SULLIVAN,

Appellant,

v.

JULIUS T. CUYLER, Superintendent, State Correctional Institution, Graterford, Pennsylvania, and THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges,* and GERRY, *District Judge.**

The petition for rehearing filed by Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

ALDISERT
Judge

Dated: March 12, 1979

* Honorable John F. Gerry, of the United States District Court for the District of New Jersey, sitting by designation.

GARTH, *Circuit Judge,* with whom ADAMS and ROSENN, *Circuit Judges,* join, dissenting from order denying petition for rehearing:

The issue presented by this appeal is whether the appellant Sullivan was deprived of his Sixth Amendment right to effective assistance of counsel, because the privately retained attorneys who represented him at his trial also represented other defendants, who had been charged with Sullivan but who were tried separately and at a date subsequent to Sullivan's conviction of murder. A panel of this court has ordered that a writ of habeus corpus issue, discharging Sullivan from state custody unless the state retries him within a reasonable time. The panel held that this case involved "dual representation" of Sullivan and the defendants in the subsequent trial, and that "[b]ecause we cannot say on this record that the dual representation raised no possibility of prejudice or conflict of interest, however remote, our prior cases compel reversal."

In reaching this conclusion, the panel relied principally on *United States ex rel. Hart v. Davenport,* 478 F.2d 203 (3d Cir. 1973). As in this case, the defendant in *Hart* was represented by privately retained counsel. Recognizing that in the absence of state action, the attorney's ineffective assistance may not be attributed to the state under the fourteenth amendment, as it incorporates the sixth amendment, this Court held in *Hart* that,

> [W]here the questioned conduct of such attorney takes place in the presence of the court or the state attorney, the state action basis for vindication of the alleged fourteenth amendment deprivation is the failure of the state prosecutor or state court to take necessary corrective action.

Id. at 210. Where, however, there is no indication that "the state's attorney or the court had knowledge of the alleged deprivation," or that the proceedings are fundamentally unfair because "the attorney's conduct is so lack-

ing in competence or good faith that it [should have] shocked the conscience of the court or prosecutor as officers of the state," the requisite state involvement is missing. *See id. See also Fitzgerald v. Estelle,* 505 F.2d 1334, 1336-38 (5th Cir. 1975) (en banc). But although state action was found to be present in *Hart,* there would appear to be no evidence in the present case that the trial judge or the prosecutor was aware, or should have been aware, of the alleged conflict of interest. And certainly nothing in the record suggests that Sullivan's representation by two of Philadelphia's best known trial attorneys was so grossly deficient as to render the proceedings fundamentally unfair.

I recognize that judges elsewhere have taken the position that whenever retained counsel's representation is ineffective, state action exists "because the state adjudicatory machinery is inextricably intertwined with the conduct of an accused person's retained attorney." *Fitzgerald, supra,* at 1345 (Godbold, dissenting). But as I understand it, that is not the law in this Circuit or in any other court of appeals. Nor am I convinced that such an approach to the constitutional requirement of state action comports with present Supreme Court guidelines. In any event, if the majority now wishes to renounce the position taken in *Hart* in favor of such a rule, *en banc* consideration would appear to be warranted.

I believe that *en banc* reconsideration is appropriate for a second reason as well. *Hart,* upon which the panel relied in adopting a standard under which a conflict of interest exists whenever there is a possibility of prejudice, established the standard for a *joint,* as distinct from a *dual,* representation case. Joint representation, as I understand it, is the representation by the same attorney of two or more defendants at the same trial. Dual representation, on the other hand, is the representation by the same attorney of two or more defendants, each of whom is tried separately and at different times. Hence, I agree with the panel that *Sullivan* presents a case of dual representation.

But *Hart,* together with all of the other cases upon which the panel has relied, involves joint representation.

I believe that there are significant and relevant distinctions that exist between joint representation cases and dual representation cases, none of which have been explored by the panel. In this statement *sur* petition for rehearing, I do not think it appropriate to explicate all of the differences which exist. That task is for the panel. I think it important, however, to point out that at the very least, actual prejudice must be found before relief may be afforded on a dual representation claim of the type advanced by Sullivan. I do not believe that the *mere possibility of prejudice,* which is the standard under *Hart* for a case involving joint representation, should be woodenly applied in a case where the defendants were tried separately in individual trials. Moreover, I believe that a defendant who claims that his attorney's representation of other persons at different and discrete trials, deprived him of effective assistance of counsel at his *own* trial, must show that he suffered actual prejudice which would have had a material effect on the outcome of his own trial.

Whether or not the "finding" by the *Sullivan* panel of actual prejudice is an appropriate or correct finding in the circumstances of this case does not diminish my concern for the standard enunciated in the opinion. I observe that, prior to this case, we have never established any standard for a dual representation claim, and that to my knowledge, no other Circuit has formulated such a standard. Our decision will affect the conduct of attorneys and litigants in innumerable multi-defendant cases. I therefore believe that it should be the court *en banc* which formulates the appropriate standard for cases involving claims of dual representation.

We should not be oblivious to the practical implications of the panel's decision either. In the wake of *Sullivan,* which disregards the prerequisites articulated in *Hart* for a finding of state action and at the same time permits a

conflict of interest in a dual representation case to be predicated on the mere possibility of prejudice, however remote, it will be necessary for prosecutors and trial court judges within our jurisdiction to insist that co-defendants never be represented by the same privately retained counsel, even when they are to be tried separately. If prosecutors and judges fail to insist upon separate representation, they run the risk of having convictions overturned, as trial strategy decisions by the attorney, which in retrospect may arguably be seen as favoring one of his clients over the other, are attributed to the state for purposes of the sixth and fourteenth amendments, "even if the defense strategy actually chosen would not be subject to attack on the ground of ineffective assistance of counsel had the choice been made by independent counsel." Slip op. at 14-15.

It is for these reasons that I have voted to grant the petition for rehearing.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1411

UNITED STATES OF AMERICA ex rel.
JOHN SULLIVAN,

Appellant,

v.

JULIUS T. CUYLER, Superintendent, State Correctional Institution, Graterford, Pennsylvania, and THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 77-2527)

Argued November 16, 1978

Before: ALDISERT and HUNTER, *Circuit Judges,* and GERRY, *District Judge.**

(Opinion filed February 14, 1979)

Marilyn J. Gelb, Esquire
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15th Floor
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Counsel for Appellant

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* Honorable John F. Gerry, of the United States District Court for the District of New Jersey, sitting by designation.

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Counsel for Appellees

OPINION OF THE COURT

GERRY, *District Judge.*

This appeal from the denial of a petition for habeas corpus requires this court to consider again the troubling issue of dual representation of multiple criminal defendants by the same counsel. Petitioner John Sullivan claims, *inter alia,* that he was denied his sixth amendment right to effective assistance of counsel at trial because his attorneys also represented his co-defendants. The district court concluded that there had been no dual representation and denied the petition. We reverse.

I.

Petitioner Sullivan was convicted of two counts of first degree murder in 1967 and sentenced to life imprisonment. He has since then continuously attacked his conviction in state and federal court. Before reaching the merits, we must review the confusing series of direct appeals and collateral attacks that form the record in this case.

On the evening of June 17, 1966, John Gorey, a minor labor union official, and Rita Janda, his female companion, were shot to death in Gorey's office at the Philadelphia headquarters of Teamsters' Local 107. After a medical examiner's inquest on November 3, 1966, petitioner and two others, Gregory Carchidi and Anthony DiPasquale, were arrested and indicted for the murders.

Two attorneys, G. Fred DiBona[1] and A. Charles Peruto, entered appearances on behalf of each of the three defendants. Petitioner, in June, 1967, was the first to come to trial. The defense rested at the close of the Commonwealth's case without presenting any evidence. After the two week trial, the jury convicted petitioner and fixed his punishment at life imprisonment. Carchidi and DiPasquale were later acquitted in separate trials.[2]

A three judge panel of the Court of Common Pleas denied petitioner's post trial motions on July 15, 1968, with one judge voting to grant a new trial. After sentence was imposed, petitioner filed a direct appeal to the Pennsylvania Supreme Court. He also filed an application in the trial court for a Writ of Error Coram Nobis which was denied. His appeal was submitted to the supreme court on briefs on November 26, 1969. On December 29, 1971, an equally divided court affirmed his conviction. *Commonwealth v. Sullivan,* 446 Pa. 419, 286 A.2d 898 (1971). Petitioner, through new counsel, who continues to represent him in this court, twice sought to persuade the supreme court to reconsider its decision. Both applications were denied.[3]

Meanwhile, petitioner Sullivan was not content to await the outcome of his state appeal but launched, without benefit of counsel, a collateral attack upon his conviction by petitioning for habeas corpus relief in federal court. His petitions were dismissed.[4] Appellate review and federal

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1. G. Fred DiBona is now a judge of the Court of Common Pleas in Philadelphia.

2. Carchidi was acquitted after trial on January 26, 1968; DiPasquale on March 14, 1968. Both were represented at trial by Peruto with Judge DiBona assisting him.

3. *See Commonwealth v. Sullivan,* 472 Pa. 129, 180, 371 A.2d 468, 492 (1977) (concurring and dissenting opinion of Pomeroy, J.).

4. *United States ex rel. Sullivan v. Rundle,* No. 69-244 (E.D. Pa., June 12, 1969) and *United States ex rel. Sullivan v. Rundle,* No. 69-452 (E.D. Pa., Sept. 17, 1969), *certificate of probable cause denied,* Misc. No. 1377 (3d Cir., Dec. 31, 1969), were dismissed because petitioner's direct appeal was still pending. *United States ex rel. Sullivan v. Johnson,* Civil Action No. 73-1694 (E.D. Pa., Sept. 11, 1973) was dismissed for failure to exhaust state remedies.

habeas corpus having proved unavailing, petitioner collaterally attacked his conviction in the Pennsylvania courts. On October 30, 1973, counsel filed a petition for post-conviction relief under the Pennsylvania Post-Conviction Hearing Act (PCHA), 19 P.S. § 1180.1 *et seq.* Five days of evidentiary hearings were held on the petition; Sullivan, Carchidi, Peruto, Judge DiBona, the trial judge, and several other witnesses testified. On November 6, 1974, the PCHA court ruled that petitioner had been denied effective assistance of counsel on appeal and permitted him to file a second direct appeal to the Pennsylvania Supreme Court. All other grounds for relief, including those raised here, were rejected.

Petitioner filed his second appeal *nunc pro tunc;* he also appealed from the denial of post-conviction relief on other grounds. The Commonwealth cross-appealed the decision to permit a second direct appeal to be filed. All three appeals were consolidated and argued before the supreme court on January 16, 1975. On February 28, 1977, the court issued an opinion affirming both petitioner's original conviction and the denial of post-conviction relief. *Commonwealth v. Sullivan,* 472 Pa. 129, 371 A.2d 468 (1977).

Having exhausted state remedies,[5] Sullivan filed this petition for habeas corpus in the United States District Court for the Eastern District of Pennsylvania. He alleged the following grounds for relief: (1) that the admission into evidence of color slides of the victims' bodies was a denial of due process; (2) that the factual basis underlying his conviction was so totally devoid of evidentiary support as to deny him due process; (3) that defense counsel had a conflict of interest because they also represented his two co-defendants; (4) that counsel was ineffective for failing to object to certain testimony; (5) that counsel was ineffective for failing to reserve objections to the of-

5. Respondents concede in their brief that petitioner has exhausted state remedies.

fering of a secret memorandum to the trial judge; (6) that the trial judge erred in his instructions to the jury so as to deny due process; and (7) that the failure of the prosecution to disclose to the defense certain evidence denied him due process. The petition was referred to a United States magistrate for report and recommendation. The magistrate found that all grounds except dual representation were without merit. He recommended that the writ issue because petitioner's trial counsel also represented his co-defendants and the record disclosed a possibility of prejudice or conflict of interest arising from this dual representation.

The district judge denied the petition. He accepted the magistrate's recommendations on every ground asserted except dual representation. As to that ground, he adapted the conclusion of the Pennsylvania Supreme Court that there had been no dual representation. He also found that no conflict of interest actually existed. Petitioner appeals from this order. Because we believe reversal is compelled on the issue of dual representation and conflict of interest, we do not reach the other grounds asserted.[6]

II.

The evidence underlying petitioner's conviction was entirely circumstantial. The Pennsylvania Supreme Court summarized it in the light most favorable to the Commonwealth as follows:

> The chief prosecution witness, one Francis McGrath, was employed as a janitor at the union hall where the bodies were eventually discovered. On July 17, 1966, he arrived at work approximately 6:00 P.M. and parked his automobile in the lot adjacent to the building. At that time, he specifically observed two

6. Although we viewed the color slides of the victims' bodies which were introduced at trial, we need not decide whether their admission into evidence denied petitioner his constitutional right to a fair trial. No doubt the court on retrial will be better placed to consider this close evidentiary question which has twice divided the state supreme court.

other vehicles on the premises. One was owned by appellant and the other was being used at the time by one Anthony DiPasquale. After alighting from his car, McGrath noticed appellant looking out onto the parking lot from the window of a second floor office normally used by other union officials. The witness then entered the building and proceeded to the second floor to commence his duties. Appellant was still seated by the window when McGrath entered that office. Sullivan inquired about the janitor's presence and instructed McGrath to wait until Sunday night to clean, since a union meeting was scheduled for that date and the building would require cleaning after the gathering. McGrath ignored the suggestion and continued collecting the trash from the offices. The witness then took the refuse outside the building. When he returned, appellant was still seated at the window.

At this time, both Sullivan and McGrath observed John Gorey and Rita Janda arrive at the union hall in Gorey's car and enter the building. McGrath then began cleaning the conference room, located approximately 75 feet from Gorey's office. Shortly thereafter, Gorey appeared and had a brief conversation with McGrath. Immediately after Gorey left the conference room, appellant appeared in the doorway, through which Gorey had just passed, and again questioned McGrath about the cleaning and suggested he defer his activities until Sunday afternoon. During this brief conversation, Gregory Carchidi, another janitor, entered the conference room. No conversation ensued between Carchidi and Sullivan but Carchidi repeated appellant's urgings to leave the work until Sunday. Sullivan then left the room through the same door which Gorey had exited but Carchidi remained and seated himself behind the desk.

Within several minutes, the witness testified he heard sounds like firecrackers going off in rapid succession. McGrath started to question Carchidi about the disturbance but was abruptly instructed to "Get out of the building and don't say nothing" (sic). McGrath left the union hall and noticed four cars other than his own parked in the lot. These were recognized as belonging to DiPasquale, Gorey, Carchidi and appellant. McGrath drove off but returned to the premises within 15 minutes. Only Gorey's car remained in the lot. Upon re-entering the building, he found the offices closed, the conference room locked and the lights out.

The victims' bodies were discovered the following morning. Gorey had been shot four times and Janda six times, the shots being fired from close range. The ballistics studies established two separate guns were employed in the homicides but the weapons were never recovered.

Additional testimony disclosed that the telephone lines had been arranged so that regular incoming calls would ring in the room in which appellant was seated. A second line with a different call number had been prearranged by Gorey to ring in his office so that he could receive an anticipated call from Joseph Vernick at 7:00 P.M. One Irene Glenn testified for the Commonwealth that she dialed the regular union phone number about 6:15 P.M. that evening and a man answered identifying himself as Gorey. A scrap paper found in the wastebasket alongside the desk where appellant had been seated prior to the victim's arrival contained Ms. Glenn's name and telephone number. It was uncontested that the handwriting was that of appellant. Moreover, one Joseph Vernick testified that he called Gorey's office at a specially arranged time but received no answer despite his repeated attempts between 7:15 and 8:15 P.M. This evidence, coupled with the medical examiner's testimony, indicated that the time of death could have been approximately 7:15 P.M.

Commonwealth v. Sullivan, supra, 472 Pa. at 147-49, 371 A.2d at 477. *See also Commonwealth v. Sullivan, supra,* 446 Pa. at 424-27, 286 A.2d at 898-900.

Petitioner did not testify and no evidence was introduced on his behalf.

III.

Our first task is to determine whether there was dual representation: that is, whether petitioner was in fact represented by an attorney or attorneys who also represented one or both of his co-defendants. The Pennsylvania Supreme Court considered this issue on petitioner's second appeal and decided:

> Appellant first claims that he was denied effective assistance of trial counsel because his attorneys also represented two co-defendants who were tried separately for the crime . . . .
>
> Upon review of the record from the PCHA proceedings, we find appellant has failed to prove the requisite elements of his claim. First, the testimony establishes that there was no dual representation in the true sense of the term, i.e., the same counsel actively represented co-defendants. Mr. Peruto testified that it was Mr. (now Judge) DiBona who served as chief counsel for appellant during trial and made all decisions relevant to Sullivan's defense while he, Peruto, was merely assisting. These functions were reversed at the trial of the co-defendants where Mr. Peruto was chief counsel and Judge DiBona the assistant. Thus, Judge DiBona served only a minor role in the trial of the co-defendants while devoting his primary efforts to the Sullivan case. This conclusion is supported by Judge DiBona's statements that his stewardship was in no way affected by the consideration of the co-defendant's cases but was solely a product of what he considered to be the best course in his representation of Sullivan. We therefore hold that there is absolutely no evidence that a conflict existed.

472 Pa. at 161-62, 371 A.2d at 483.

Respondents urge that this conclusion is a finding of fact by a state court after a full hearing which is entitled to a presumption of correctness and should be accepted by this court. Petitioner argues that we should reject it because the record as a whole does not support the supreme court's factual determination. The magistrate accepted petitioner's position while the district judge accepted respondents'. We believe both were mistaken in their approach to this problem. While it is true that state court factual findings are entitled to deference in this court unless they are not fairly supported by the record as a whole, the Supreme Court has defined "facts" very narrowly in this context. In *Townsend v. Sain,* 372 U.S. 293, 309 n.9 (1963), the principal case on the scope of federal court review of state findings on habeas corpus, the Court defined the findings entitled to deference as follows:

> By "issues of fact" we mean to refer to what are termed basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators . . . ." So called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense. (Citation omitted.)

The Court went on to emphasize:

> Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court findings independently.

362 U.S. at 318.

Properly speaking the supreme court's conclusion that there was no dual representation was not a finding of fact but a legal conclusion—the application of a legal standard to the facts developed on the record. We conclude that there was dual representation in this case.

Both Judge DiBona and Peruto entered appearances on behalf of petitioner and his two co-defendants shortly after their arrest and indictment. Sullivan had been represented at the inquest by another attorney but could not afford to retain him to represent him on the murder charge. Sullivan testified at the PCHA hearing that while he was imprisoned awaiting trial, he discussed his inability to afford counsel with his two co-defendants who told him they had already made arrangements with "Mr. Peruto and his partner" (Judge DiBona was not identified to petitioner at this time), and that they would represent all three defendants. They told him not to worry, and he agreed to the arrangement. Neither Sullivan nor his family paid any counsel fee to Judge DiBona and Peruto.[7]

A unified defense was prepared. One investigation was conducted on behalf of all three defendants. On numerous occasions the three defendants met jointly with both attorneys and discussed the preparation of a defense. The three defendants also met the investigator hired by counsel together and discussed their defense.

When Sullivan came to trial, Judge DiBona was his principal trial counsel who made opening and closing speeches and examined witnesses.[8] Peruto, by prearrangement, assisted him. Judge DiBona considered that he and Peruto were "associate counsel" at this trial and at the trials of the two co-defendants. Peruto was present at

7. The matter of who paid these privately retained attorneys was never developed at the PCHA hearing. Apparently, friends of the defendants raised money from contributions and "selling chances," i.e., holding a lottery. What other sources of funds there may have been remains unclear.

8. It is unclear how it was decided that Judge DiBona would be chief trial counsel. Peruto testified that a meeting was held at which each defendant was asked which lawyer he would prefer to try his case, and Sullivan chose Judge DiBona because of his greater age and experience. Sullivan denied this. He claims to have had no idea that one lawyer was to have principal responsibility for his case; he considered them equally involved in the trial.

counsel table throughout the trial. He examined prospective jurors on voir dire. During the trial, he consulted with petitioner, and he and Judge DiBona frequently conferred on matters of trial strategy. He argued motions and objections to the court virtually every day of the trial. After the Commonwealth had completed its proofs, petitioner and counsel had a lengthy private conference on defense strategy, at which Peruto advised petitioner not to testify and not to present witnesses in his defense; this course was eventually chosen. After the verdict was returned, Peruto argued the penalty phase of trial to the jury, which under Pennsylvania law decides between life imprisonment and death in first degree murder cases.

The state court based its finding that there was no dual representation on its assessment of Peruto's role in petitioner's defense. It concluded that his role was so minor that he did not represent Sullivan and that the defense was the sole responsibility of Judge DiBona. We believe that an attorney who enters an appearance on behalf of a criminal defendant, consults with him confidentially for the purpose of preparing a defense, investigates his case, aids in the pretrial preparation of his defense, appears at his trial, participates in the selection of the jury that is to decide his fate, argues motions and objections, confers with co-counsel on trial strategy, offers the defendant legal advice, including advice on whether he should testify or present evidence in his defense, and argues the issue of penalty, a matter of life and death, to the jury on the defendant's behalf must be said to represent that defendant and owe to him all the duties an attorney owes to a client in a criminal case. We find that Peruto represented Sullivan as well as Carchidi and DiPasquale.

The state court also based its finding of no dual representation on the assumption that Judge DiBona played such a minor role in the trials of the other two defendants that he could be said to represent Sullivan alone. This conflicts with Judge DiBona's understanding of his role; he testified that he and Peruto were "associate counsel in all

three cases." It also overlooks the fact that while Peruto eventually acted as principal trial counsel to both Carchidi and DiPasquale that this arrangement was made after Sullivan's trial. At the Sullivan trial, Judge DiBona told the court that he also represented Carchidi, to whom he referred as "my other client," while Peruto represented that he was counsel to DiPasquale as well as co-counsel to Sullivan. Thus, at the time of petitioner's trial—which is the critical time—Judge DiBona saw himself as "chief counsel" not only to Sullivan, but to his co-defendant Carchidi as well, and Peruto shared this view.

Whatever may have been the extent of each attorney's participation in the trials of the various defendants, we are satisfied that it was sufficient to establish that both attorneys represented all three defendants. Petitioner was represented by two attorneys, both of whom also represented his two co-defendants and who seem to have viewed themselves as a defense "team" acting on behalf of all three of the accused.

IV.

A finding of dual representation does not, without more, require reversal. The standard for determining whether representation of co-defendants by the same attorney is a denial of sixth amendment rights was set in this circuit in *Walker v. United States*, 422 F.2d 374, 375 (3d Cir.) (per curiam), *cert. denied*, 399 U.S. 915 (1970).

> [R]epresentation of co-defendants by the same attorney is not tantamount to the denial of effective assistance of counsel guaranteed by the sixth amendment. There must be some showing of a possible conflict of interest or prejudice, however remote, before a reviewing court will find the dual representation constitutionally defective.

Numerous recent cases in this circuit have repeated this standard and made clear that actual prejudice or conflict

of interest need not be shown.[9] The mere possibility, however remote, is sufficient.

This rule recognizes that "[t]he right to counsel guaranteed by the sixth and fourteenth amendments contemplates the services of an attorney devoted solely to the interests of his client." *United States ex rel. Hart v. Davenport*, 478 F.2d 203, 209 (3d Cir. 1973). Anything less must be regarded as an infringement of the right to counsel. And the Supreme Court has said: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, 315 U.S. 60, 75-76 (1942).

The *Walker* rule also recognizes that after the fact it is often difficult or impossible to determine whether a defendant has been prejudiced by dual representation. Dual representation interferes with an attorney's independent professional judgment. The harm is often in what it tends to prevent an attorney from doing on behalf of his client. *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978). For example, an attorney with divided loyalties cannot negotiate a plea agreement on behalf of one client which includes an agreement by that client to testify against a co-defendant the attorney also represents. *Id.* He may refrain from introducing evidence favorable to one client but harmful to another; or he may refrain from challenging evidence that harms one client but is helpful to another. These and similar conflicts of interest ordinarily do not appear in the record. The Supreme Court recently discussed this problem in *Holloway v. Arkansas, supra*, and noted:

> In the normal case where a harmless error rule is applied, the error occurs at trial and its scope is readily

9. *United States v. Levy*, 577 F.2d 200 (3d Cir. 1978); *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978); *United States ex rel. Horta v. DeYoung*, 523 F.2d 807 (3d Cir. 1975) (per curiam); *United States ex rel. Hart v. Davenport*, 478 F.2d 203 (3d Cir. 1973); *United States v. Rispo*, 470 F.2d 1099 (3d Cir. 1973); *United States v. Donovan*, 464 F.2d 495 (3d Cir.), *cert. denied*, 409 U.S. 1044 (1972); *Government of the Virgin Islands v. John*, 447 F.2d 69 (3d Cir. 1971); *United States ex rel. Small v. Rundle*, 442 F.2d 235 (3d Cir. 1971); *United States ex rel. Darrah v. Brierley*, 415 F.2d 9 (3d Cir. 1969).

identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. But in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

435 U.S. at 490-91.

Even where the attorney has failed to undertake certain trial tasks, it is difficult to determine whether prejudice has resulted. For decisions not to offer evidence, or interpose objections, and so forth, may well be legitimate tactical decisions if made by independent counsel. If made by counsel with divided loyalties, they are suspect because a reviewing court cannot reliably determine to what extent the decisions were based on legitimate tactical considerations and to what extent they were the result of impermissible consideration of the best interests of other clients. Accordingly, this court has held that a state conviction cannot stand when an examination of the record reveals that representation by independent counsel "might have made a difference in defense strategy." *United States ex rel. Horta v. DeYoung*, 523 F.2d 807, 809 (3d Cir. 1975) (per curiam). This is so even if the defense strategy actually

chosen would not be subject to attack on the ground of ineffective assistance of counsel had the choice been made by independent counsel.

Our examination of the record convinces us that there is in this case at least a possibility of prejudice or conflict of interest and that independent counsel might well have chosen a different trial strategy. Therefore, prior decisions of this court compel reversal.

The critical decision counsel made in this case was to rest at the close of the Commonwealth's case without presenting petitioner's testimony or other evidence on his behalf. Although we have little doubt that this would have been a legitimate tactical decision if made by independent counsel,[10] in this case it raises a possibility of prejudice or conflict of interest. The potential for conflict inherent in this situation is vividly demonstrated by Peruto's testimony at the PCHA hearing on the subject of why no defense had been presented.

> Q. Well, at any rate you had made a decision not to present any testimony anyway, hadn't you?
>
> A. In the Sullivan trial?
>
> Q. The Sullivan case, yes.
>
> A. Yes. I can recall the great discussions that we had with Sullivan where we were so convinced that—and we communicated this to Sullivan——
>
> THE COURT: When you say great discussion, you mean lengthy discussion?
>
> THE WITNESS: Lengthy discussion, yes, sir. Where we felt that he couldn't possibly be convicted and, therefore, what's the sense in exposing the defense because we had two more defendants to try.
>
> BY [petitioner's counsel]:
>
> Q. Wait——

10. Indeed, the Pennsylvania Supreme Court evenly divided on the issue of whether the evidence was sufficient to support a conviction. *Commonwealth v. Sullivan*, *supra*, 446 Pa. 419, 286 A.2d 898 (1971).

A. And I'm afraid Sullivan suffered by that fact.

Q. Wait just a minute, sir. You were concerned with the other two defendants you represented; is that correct?

A. Yes. Why expose your defense if you've got two more people to come to trial and the Commonwealth has not presented a case?

Q. So that entered into your consideration as to whether or not you presented a defense in the Sullivan case?

A. Sure, it did. When we're talking about back and forth. For example, I've heard Judge DiBona testify today, and, yes, we were sort of playing devil's advocate. I didn't want the defense to go on because I thought we would only be exposing the defendant witnesses for the other two trials that were coming up. . . . And as I look back on that, although it was not my thought that John Sullivan should be short-changed in any fashion, I'm afraid that it was my thought that I was over-solicitous for the other two defendants being ready to be tried.

He further testified that he opposed calling three witnesses who had been in the vicinity of Local 107 headquarters at the time the crime was alleged to have occurred because "I . . . recall that I felt that it might be dangerous because one of the other two defendants leaving in a hurry might have been seen by those three witnesses and it might have damaged that defendant and it might have come out on the cross-examination of those witnesses in Sullivan's case."

Sullivan's PCHA hearing testimony confirms Peruto's recollection. He testified that at the close of the Commonwealth's proofs, he met with both his attorneys and they discussed whether a defense should be offered and whether he should testify. The reasons offered to him for not doing so were that in counsel's opinion there was not enough evidence to convict him, and there was no reason to risk using evidence that might harm his co-defendants. Peruto told

him "there was no sense in putting anything on that may hurt the other two [defendants] because we've got this case won."

Respondents do not argue here, as they did in the court below, that Peruto's testimony is unworthy of belief, perhaps because they rely upon it so heavily in support of their contention that there was no dual representation. They do urge us, however, to accept Judge DiBona's explanation instead. He testified that the final decision not to present a defense was made jointly by petitioner and counsel. His decision to advise that course, he testified, was not in any way based upon a desire to protect his other clients, but was entirely based upon his professional judgment that the Commonwealth had not proved its case. Respondents argue that "[t]he testimony clearly shows that appellant's decision that no defense evidence be presented was based on counsel's view, with which appellant concurred, that the Commonwealth had simply not presented sufficient evidence to obtain a conviction."

We believe this analysis is seriously flawed. It is undisputed that Peruto participated in the decision not to present a defense. He advised petitioner not to testify and suggested to co-counsel that witnesses not be called. No reason or evidence is offered to explain why an attorney would make the damaging admission of professional impropriety we have quoted were it not true. And Sullivan (albeit not a disinterested witness) corroborates his testimony. We have no basis on which to reject Peruto's sworn admission that he injected improper considerations into the attorney-client relationship.

We believe that Peruto's testimony illustrates in the plainest possible terms the potential for conflict of interest. The evidence in this case was scant. What little there was was jealously guarded by the opposing attorneys from premature disclosure. Although counsel owed a duty to petitioner to produce any available evidence which would in their judgment aid his defense, they also owed a duty to

his co-defendants not to tip their hand to the Commonwealth. At this trial both parties took maximum advantage of the element of surprise. There was at least a potential conflict among the defendants as to which would receive the benefit of this tactic.

Moreover, by asking us to rule that counsel's decision not to present a defense was a legitimate tactical decision, made in good faith on sound professional judgment by Judge DiBona, respondents are asking us to decide that there was in fact no prejudice. This misses the point. The standard requires us to determine whether there is a possibility of prejudice or conflict of interest, *however remote.* To hold, in the face of this record, that there was not such a possibility would be to, in effect, overrule a long line of cases in this circuit and require a showing of actual prejudice. This we cannot do.

There is also other evidence of conflict of interest in this record. A critical thread in the Commonwealth's web of circumstantial evidence was the statement allegedly made to McGrath by Carchidi: "Get out of the building and don't say nothing." This statement was admitted into evidence as a declaration by a co-conspirator.[11] It could only have been rebutted by the testimony of Carchidi. At the PCHA hearing, Carchidi testified that he had not made the statement and was available, and willing, to so testify at Sullivan's trial, but counsel had told him his testimony was unnecessary because the evidence was insufficient to convict. The trial record suggests, however, that the decision not to call Carchidi as a witness may have been made before the close of the Commonwealth's case. Peruto argued to the trial judge that the statement was inadmis-

11. Argument over the admissibility of this statement at trial centered on whether or not it was a co-conspirator declaration. On the first direct appeal, the Pennsylvania Supreme Court ruled that it was admissible under the spontaneous utterance or res gestae exception to the hearsay rule and did not decide whether it was a declaration by a co-conspirator, 446 Pa. at 439, 286 A.2d at 906. The court abandoned this view on the second direct appeal and ruled that it was admissible as a co-conspirator declaration and declined to reach any other grounds. 472 Pa. at 159-60, 371 A.2d at 482-3. This is, of course, the final decision of the Pennsylvania courts on this point of state evidence law.

sible because it could only be refuted by Carchidi "and you can't put Carchidi on the record." This suggests to us that counsel may have decided against using Carchidi as a witness before they knew whether or not the Commonwealth's proofs were sufficient.

Both of petitioner's attorneys owed a duty to Carchidi to protect him against possible self-incrimination. They could not have sought to compel him to testify if it were against his interest to do so. We think this situation was much like that presented in *United States v. Levy,* 577 F.2d 200, 211 (3d Cir. 1978), where this court held that the fact that a criminal defendant had "waived his right to present a witness on his behalf on the basis of advice from an attorney who owed an obligation to that witness, an obligation which may well have conflicted with the attorney's duty of loyalty to [the defendant]" would require a reversal of the conviction "even under a rule requiring a finding of prejudice." These attorneys owed a duty of loyalty to Carchidi which may well have conflicted with the duty they owed petitioner.

Respondents also argue that ultimately it was petitioner himself, and not his attorneys, who decided not to take the witness stand and that his decision was based on personal considerations and not influenced by dual representation. Further, they submit, once petitioner had decided not to testify there were no witnesses whose testimony would have been worthwhile. Any complaint about the failure to produce defense witnesses is, in their judgment, illusory. These arguments are also directed to the question whether there was actual prejudice which, as we have noted, we may not consider. We think there are other reasons for rejecting them as well.

As to the first argument, it is not at all clear on this record that petitioner did make the ultimate decision not to testify. His hearing testimony was that:

> A. I had nothing to do with the decision. It was given to me point blank. And Mr. Peruto, after like

> I say hours of discussion, Mr. Peruto said something to the effect of, "Look, we're the attorneys. You don't know anything about law"—I'm not quoting him verbatim, I'm using my own language—and your life is in my hands and we're out to protect it, and you're not to worry, that you'll be acquitted and we're assured that you'll be acquitted. And I said, "Look, you got it, you got the ball, carry it."

Even had petitioner himself made the ultimate decision not to testify, it is plain that his decision was made on the advice of counsel. For it is undisputed that at least one of his lawyers strongly urged him not to testify. Following this advice can hardly be considered an independent decision that bars petitioner from later complaining of the dual representation that rendered the advice itself suspect. *See United States v. Levy, supra,* 577 F.2d at 210-11. Indeed it is the very fact that petitioner followed the course suggested by counsel that creates the possibility of prejudice.

The contention that there were no witnesses whose testimony would have been useful requires us to speculate as to what witnesses who have never testified, some of whom are now deceased, would have said and whether independent counsel would have used their testimony. This we cannot do. Indeed, it is the purpose of the *Walker-Hart* rule to avoid such speculation. Judge DiBona, in his opening statement to the jury, offered to produce evidence on petitioner's behalf. Why counsel chose not to present this evidence, and whether independent counsel would have done otherwise, are matters about which we cannot speculate. It is sufficient that independent counsel might have acted differently.

V.

We find that there was in this case dual representation of petitioner Sullivan and his co-defendants. Because we cannot say on this record that the dual representation

raised no possibility of prejudice or conflict of interest, however remote, our prior cases compel reversal. We do not reach the other grounds asserted.

The order of the district court will be reversed and the case remanded with a direction that the writ of habeas corpus should issue discharging the petitioner John Sullivan from state custody unless within a reasonable time fixed by the district court he is afforded a new trial.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U. S. Courts, International Printing Co., Phila., Pa.)

APPENDIX C

ORDER AND OPINION OF THE DISTRICT COURT INCORPORATING IN PART AND REJECTING IN PART THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

ORDER

DAVIS, S.J.

AND NOW THIS 2ND DAY OF FEBRUARY, 1978, AFTER CAREFUL AND INDEPENDENT CONSIDERATION OF RELATOR'S PETITION FOR A WRIT OF HABEAS CORPUS, AND AFTER REVIEW OF THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE, IT IS ORDERED THAT:

1. THE REPORT IS APPROVED AND ADOPTED INSOFAR AS IT IS NOT IN CONFLICT WITH THE ACCOMPANYING OPINION OF THE COURT.

2. THE RECOMMENDATION IS REJECTED.

3. THE PETITION FOR A WRIT OF HABEAS CORPUS IS DENIED.

4. THERE EXISTS PROBABLE CAUSE FOR APPEAL.

/S/ JOHN MORGAN DAVIS, J.

MEMORANDUM AND ORDER

DAVIS, S.J.

JOHN SULLIVAN, RELATOR IN THIS HABEAS CORPUS ACTION, WAS CONVICTED BY A JURY IN PHILADELPHIA COUNTY, PENNSYLVANIA, ON JUNE 19, 1967 OF TWO COUNTS OF FIRST DEGREE MURDER FOR THE KILLINGS OF JOHN GOREY AND RITA JANDA, WHICH TOOK PLACE ON

JUNE 17, 1966. AFTER EXHAUSTING HIS STATE REMEDIES, HE HAS COME BEFORE THIS COURT SEEKING HABEAS CORPUS RELIEF, AND ASSERTING NUMEROUS REASONS THEREFOR.

ON NOVEMBER 3, 1977, UNITED STATES MAGISTRATE EDWIN E. NAYTHONS FILED A LENGTHY AND COMPREHENSIVE REPORT TO THIS COURT RECOMMENDING THAT A WRIT OF HABEAS CORPUS BE GRANTED THE RELATOR, AS A SINGLE ONE OF HIS SEVEN CONTENTIONS APPEARED TO BE MERITORIOUS. THAT CONTENTION WAS THAT DEFENSE COUNSEL HAD A CONFLICT OF INTEREST BECAUSE HE ALSO REPRESENTED TWO OTHER PERSONS CHARGED WITH THE SAME CRIME. AS TO RELATOR'S OTHER SIX ALLEGATIONS OF GROUNDS FOR RELIEF, MAGISTRATE NAYTHONS REPORTED THAT THEY WERE WITHOUT MERIT. AFTER CAREFUL AND INDEPENDENT CONSIDERATION OF RELATOR'S PETITION FOR A WRIT OF HABEAS CORPUS, I HAVE CONCLUDED THAT THE MAGISTRATE'S REPORT IS CORRECT AS TO THOSE SIX OTHER CONTENTIONS, BUT I MUST DISAGREE WITH THE RECOMMENDATION THAT THE CONFLICT OF INTEREST CLAIM IS VALID. THEREFORE, I AM ADOPTING THE MAGISTRATE'S REPORT, WHICH IS INCLUDED HEREIN AS AN APPENDIX, INSOFAR AS IT IS NOT IN CONFLICT WITH THIS OPINION WHICH WILL BE CONCERNED SOLELY WITH THE QUESTION OF TRIAL COUNSEL'S ALLEGED CONFLICT OF INTEREST.

A BRIEF FACTUAL BACKGROUND CONCERNING THE CIRCUMSTANCES OF THE ALLEGED CONFLICT MIGHT BE OF VALUE AT THIS TIME. RELATOR WAS CHARGED WITH THE OFFENSE ALONG WITH TWO OTHER MEN, GREGORY CARCHIDI AND ANTHONY DIPASQUALE. BEFORE TRIAL, ATTORNEYS A. CHARLES PERUTO AND G. FRED DIBONA WERE APPOINTED TO REPRESENT

THE THREE CO-DEFENDANTS. ACCORDING TO MR. PERUTO'S TESTIMONY AT THE POST CONVICTION HEARING ACT (PCHA) HEARING, HE AND MR. DIBONA GAVE THE THREE DEFENDANTS THE CHOICE AS TO WHICH ATTORNEY WOULD BE PRIMARILY RESPONSIBLE FOR THE CONDUCT OF THEIR RESPECTIVE TRIALS. SULLIVAN CHOSE DIBONA BECAUSE OF HIS AGE AND EXPERIENCE. THE OTHER TWO BOTH CHOSE PERUTO. (N.T. APRIL 25, 1974, 108-109).

MR. SULLIVAN NOW ALLEGES, BASED ON TESTIMONY ELICITED AT THE PCHA HEARING (SEE, INFRA) THAT MR. PERUTO PLACED THE INTERESTS OF THE OTHER TWO DEFENDANTS ABOVE THOSE OF RELATOR IN MAKING THE DECISION NOT TO PRESENT A DEFENSE. DESPITE MR. PERUTO'S TESTIMONY ON THIS ISSUE, THE FACTS AS FOUND IN THE ENTIRE RECORD OF THIS CASE UNQUESTIONABLY REBUT RELATOR'S ASSERTION.

AS MAGISTRATE NAYTHONS CORRECTLY POINTS OUT IN HIS EXCELLENT REPORT AT PAGE 39, "A DEFENDANT IS ENTITLED TO THE UNTRAMMELED AND UNIMPAIRED ASSISTANCE OF COUNSEL FOR HIS DEFENSE." Id. (CITATIONS OMITTED). ALSO, "'THE RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS CONTEMPLATES THE SERVICE OF AN ATTORNEY DEVOTED SOLELY TO THE INTERESTS OF HIS CLIENT,'" AND "THE RIGHT TO COUNSEL 'REQUIRES NOTHING LESS THAN THE UNDIVIDED LOYALTY OF COUNSEL IN BEHALF OF HIS CLIENT.'" Id. AT 40 (CITATIONS OMITTED).

NOW, IN ORDER TO FIND THAT REPRESENTATION, AS ALLEGED HERE, WAS CONSTITUTIONALLY DEFECTIVE, WE MUST EXAMINE TWO ISSUES:

1. WAS THERE, IN FACT, DUAL REPRESENTATION?

THAT IS, DID THE SAME COUNSEL ACTIVELY REPRESENT TWO INDIVIDUALS WITH POSSIBLY COMPETING INTERESTS? AND,

2. WAS THERE A SHOWING OF POSSIBLE CONFLICT OF INTEREST OR PREJUDICE, HOWEVER REMOTE?

ON THESE ISSUES THE PENNSYLVANIA SUPREME COURT HELD AS FOLLOWS:

> "THE TESTIMONY ESTABLISHES THAT THERE WAS NO DUAL REPRESENTATION IN THE TRUE SENSE OF THE TERM, I.E., THE SAME COUNSEL ACTIVELY REPRESENTED CO-DEFENDANTS. MR. PERUTO TESTIFIED THAT IT WAS MR. (NOW JUDGE) DIBONA WHO SERVED AS CHIEF COUNSEL FOR APPELLANT DURING TRIAL AND MADE ALL DECISIONS RELEVANT TO SULLIVAN'S DEFENSE, WHILE HE, MR. PERUTO, WAS MERELY ASSISTING. THESE FUNCTIONS WERE REVERSED AT THE TRIAL OF THE CO-DEFENDANTS WHERE MR. PERUTO WAS CHIEF COUNSEL AND JUDGE DIBONA THE ASSISTANT. THUS, JUDGE DIBONA SERVED ONLY A MINOR ROLE IN THE TRIAL OF THE CO-DEFENDANTS WHILE DEVOTING HIS PRIMARY EFFORTS TO THE SULLIVAN CASE, THIS CONCLUSION IS SUPPROTED BY JUDGE DIBONA'S STATEMENTS THAT HIS STEWARDSHIP WAS IN NO WAY AFFECTED BY HIS CONSIDERATION OF THE CO-DEFENDANT'S CASES, BUT WAS SOLELY A PRODUCT OF WHAT HE CONSIDERED TO BE THE BEST COURSE IN HIS REPRESENTATION OF SULLIVAN. WE THEREFORE HOLD THAT THERE IS ABSOLUTELY NO EVIDENCE THAT A CONFLICT EXISTED. COMMONWEALTH V. SULLIVAN, 371 A.2D 468, 483 (1977).

28 U.S.C. §2254(D)(8) PROVIDES THAT IN HABEAS CORPUS PROCEEDINGS FACTUAL DETERMINATIONS MADE BY THE STATE COURT ARE PRESUMED TO BE CORRECT UNLESS THE FEDERAL COURT "ON CONSIDERATION OF SUCH PART OF THE RECORD AS A WHOLE CONCLUDES THAT SUCH FACTUAL DETERMINATION IS NOT FAIRLY SUPPORTED BY THE RECORD." Id. THEREFORE IT IS MY DUTY TO INDEPENDENTLY EXAMINE THE RECORD, AND DETERMINE IF IT SUPPORTS THE FACTUAL CONCLUSIONS OF THE PENNSYLVANIA SUPREME COURT.

AN EXAMINATION OF THE RECORD OF THE SULLIVAN TRIAL CONFIRMS THAT JUDGE DIBONA WAS THE PRIMARY TRIAL COUNSEL. MAGISTRATE NAYTHONS PLACES GREAT EMPHASIS ON THE FACT THAT MR. PERUTO PARTICIPATED FROM TIME TO TIME IN THE CONDUCT OF THE SULLIVAN TRIAL, PARTICULARLY WHEN THE QUESTION OF SENTENCING WAS AT ISSUE. SEE, MAGISTRATE'S REPORT PP. 43-44. I DO NOT BELIEVE THESE ISOLATED INCIDENTS WARRANT THE IMPORTANCE ASSIGNED THEM BY THE MAGISTRATE. IT IS HARDLY SURPRISING, CONSIDERING MR. PERUTO'S REPUTATION AS AN OUTSTANDING TRIAL COUNSEL, THAT MR. DIBONA WOULD RELY ON HIM OCCASIONALLY TO EXERCISE HIS VAUNTED POWERS OF PERSUASION. INDEED, ONE MIGHT HAVE EVEN CONSIDERED MR. DIBONA FOOLISH HAD HE NOT MADE USE OF MR. PERUTO'S TALENTS, AS THEY WERE PRESENT AND AVAILABLE TO HIM AT THE TRIAL. IN ANY EVENT, THE RECORD CONCLUSIVELY ILLUSTRATES THAT IT WAS DIBONA WHO CARRIED THE BURDEN OF TRIAL COUNSEL, WHILE PERUTO MERELY ACTED AS HIS ASSISTANT. THEREFORE, I ACCEPT THE CONCLUSION OF FACT OF THE PENNSYLVANIA SUPREME COURT THAT THERE WAS NO DUAL REPRESENTATION.

HAVING FOUND THAT NO DUAL REPRESENTATION EXISTED, IT IS UNNECESSARY TO EXAMINE THE QUESTION OF WHETHER ANY CONFLICT OF INTEREST ACTUALLY EXISTED. SEE, E.G. UNITED STATES EX REL. SMALL V. RUNDLE, 442 F.2D 235, 237 (3D. CIR. 1971). HOWEVER, I WILL EXAMINE THE ISSUE FOR THE SAKE OF A MORE COMPLETE RECORD.

RELATOR CONTENDS THAT DEFENSE COUNSELS' DECISION NOT TO PERMIT HIM TO TESTIFY IN HIS OWN BEHALF, AND TO PRESENT NO OTHER EVIDENCE, WAS MOTIVATED, NOT BY A CAREFUL ASSESSMENT OF

HIS BEST INTEREST, BUT BY A DESIRE ON THE PART OF COUNSEL NOT TO REVEAL DEFENSE STRATEGY TO BE USED IN THE TRIALS OF THE OTHER TWO DEFENDANTS. IN SUPPORT OF THIS ALLEGATION, RELATOR PRESENTS THE FOLLOWING TESTIMONY WHICH WAS GIVEN BY MR. PERUTO AT THE POST CONVICTION HEARING:

> "Q. WAIT JUST A MINUTE, SIR. YOU WERE CONCERNED WITH THE OTHER TWO DEFENDANTS YOU REPRESENTED: IS THAT CORRECT?
>
> A. (BY MR. PERUTO) YES. WHY EXPOSE YOUR DEFENSE IF YOU HAVE TWO MORE PEOPLE TO COME TO TRIAL AND THE COMMONWEALTH HAS NOT PRESENTED A CASE?
>
> Q. SO THAT ENTERED INTO YOUR CONSIDERATION AS TO WHETHER OR NOT YOU PRESENTED A DEFENSE IN THE SULLIVAN CASE?
>
> A. SURE IT DID." (N.T. PCHA, APRIL 25, 1974 P. 101).

THIS, HOWEVER, IS THE ONLY TESTIMONY WHICH INDICATES EVEN THE POSSIBILITY OF A CONFLICT, AND IS WELL REFUTED BY THE RECORD WHICH SHOWS THAT IT WAS JUDGE DIBONA WHO WAS CHIEF COUNSEL AND MADE ALL OF THE DECISIONS OF THIS NATURE, AND BY JUDGE DIBONA'S OWN TESTIMONY THAT HE WAS NOT INFLUENCED IN ANY WAY BY CONSIDERATIONS CONCERNING THE OTHER DEFENDANTS. (N.T. PCHA, AUG. 6, 1974, PP. 79, 83).

THE REASON THAT SULLIVAN DID NOT TESTIFY IS CLEAR FROM THE RECORD-HE DELIBERATELY CHOSE NOT TO TESTIFY BECAUSE HE BELIEVED THERE WAS INSUFFICIENT EVIDENCE TO CONVICT HIM, AND BECAUSE HE WANTED TO AVOID EMBARRASSMENT TO HIMSELF AND HIS FAMILY WHICH MIGHT HAVE COME FROM REVELATION OF PAST INDISCRETIONS. SULLIVAN TESTIFIED DURING THE PCHA HEARING THAT HE AT ALL TIMES WANTED TO

TESTIFY AT THE TRIAL, AND PRESENT OTHER EVIDENCE. BUT THIS CONTENTION IS SIMPLY NOT BORNE OUT BY THE RECORD. ONLY SULLIVAN'S CO-DEFENDANT CARCHIDI (HARDLY A PILLAR OF CREDIBILITY UNDER THE CIRCUMSTANCES,) CONFIRMED SULLIVAN'S CONTENTION. AND SULLIVAN'S VERSION WAS DIRECTLY CONTRADICTED BY BOTH OF HIS TRIAL COUNSEL. JUDGE DIBONA TESTIFIED THAT SULLIVAN DID NOT WISH TO TESTIFY IN HIS OWN BEHALF AND COULD NOT BE PERSUADED TO DO SO BY COUNSEL, (N.T. PCHA APRIL 24, 1974, 10-11). MR. PERUTO CONFIRMED JUDGE DIBONA'S RECOLLECTION THAT IT WAS SULLIVAN'S DECISION NOT TO TESTIFY. EVEN SULLIVAN HIMSELF TESTIFIED ON CROSS-EXAMINATION AT THE PCHA HEARING THAT THE REASON HE DID NOT TESTIFY WAS BECAUSE, "THERE WAS NO EVIDENCE..." (N.T. PCHA MARCH 25, 1974, P. 215). FURTHERMORE, THERE WAS TESTIMONY ELICITED FROM SULLIVAN AT THE HEARING THAT EVIDENCE CONCERNING HIS PERSONAL LIFE WHICH MIGHT HAVE BEEN BROUGHT TO LIGHT HAD HE TAKEN THE STAND WOULD HAVE CAUSED HIM GREAT EMBARRASSMENT. (N.T. PCHA MARCH 25, 1974, PP. 212-215). CONSEQUENTLY, THE CONCLUSION IS INESCAPABLE THAT THE DECISION TO KEEP SULLIVAN OFF OF THE WITNESS STAND WAS MADE BY SULLIVAN HIMSELF, AND HE CANNOT NOW CLAIM THAT HIS COUNSEL WAS INEFFECTIVE FOR FAILING TO FORCE HIM TO TESTIFY.

FURTHER, THE RECORD REVEALS THE REASONS JUDGE DIBONA DID NOT CALL ANY OTHER DEFENSE WITNESSES. FIRST, HE DID NOT BELIEVE THAT THE COMMONWEALTH HAD PROVEN ITS CASE. SECOND, NONE OF THE WITNESSES WHICH RELATOR NOW CONTENDS WOULD HAVE HELPED GAIN HIS

ACQUITTAL WERE CONSIDERED OF ANY VALUE BY JUDGE DIBONA FOR REASONS WHICH ARE WELL DOCUMENTED IN HIS TESTIMONY OF APRIL 24, 1974. AND THIRD, CALLING THESE OTHER WITNESSES WOULD MERELY HAVE SERVED TO HIGHLIGHT SULLIVAN'S FAILURE TO TESTIFY HIMSELF. IT IS OBVIOUS FROM THE RECORD THAT THE DECISION NOT TO PUT ON ANY DEFENSE WITNESSES WAS A TACTICAL DECISION, MADE WITH THE BEST INTEREST OF RELATOR IN MIND.

FOR THE ABOVE STATED REASONS, AND FOR THE REASONS WELL STATED IN THE MAGISTRATE'S REPORT AND RECOMMENDATION, I FIND IT NECESSARY TO DENY THIS PETITION FOR A WRIT OF HABEAS CORPUS.

/S/ JOHN MORGAN DAVIS, J.

REPORT - RECOMMENDATION

EDWIN E. NAYTHONS
UNITED STATES MAGISTRATE

NOVEMBER 1, 1977

JOHN SULLIVAN, RELATOR, HAS FILED THIS PETITION FOR A WRIT OF HABEAS CORPUS FOLLOWING HIS CONVICTION BY A JURY IN PHILADELPHIA COUNTY, PENNSYLVANIA, OF MURDER IN THE FIRST DEGREE.[1] RELATOR WAS CONVICTED ON JUNE 19, 1967, AND THE PUNISHMENT WAS FIXED AT TWO CONSECUTIVE LIFE SENTENCES IN THE DEATHS OF JOHN GOREY AND RITA JANDA WHICH TOOK PLACE ON JUNE 17, 1966. FOLLOWING DENIAL OF MOTIONS FOR A NEW TRIAL AND IN ARREST

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[1] COMMONWEALTH OF PENNSYLVANIA V. JOHN SULLIVAN, COURT OF COMMON PLEAS, TRIAL DIVISION, CRIMINAL SECTION, PHILADELPHIA COUNTY, NOVEMBER SESSIONS 1966, NUMBERS 190-93.

OF JUDGMENT, JUDGMENT OF SENTENCE WAS IMPOSED AS THE JURY DIRECTED. AN APPEAL WAS TAKEN TO THE SUPREME COURT OF PENNSYLVANIA WHERE THE JUDGMENT OF SENTENCE WAS AFFIRMED BY AN EVENLY DIVIDED COURT. COMMONWEALTH V. SULLIVAN, 446 PA. 419 (1971).

RELATOR WAS REPRESENTED AT TRIAL BY THE HONORABLE G. FRED DIBONA AND A. CHARLES PERUTO, ESQUIRE. ON OCTOBER 30, 1973, RELATOR FILED A PETITION UNDER THE PENNSYLVANIA POST-CONVICTION HEARING ACT, 19 P.S. §1180-1 ET SEQ. AND AN AMENDED PETITION WAS FILED ON FEBRUARY 27, 1974, ALLEGING

(1) INEFFECTIVE ASSISTANCE OF COUNSEL;

(2) DENIAL OF RIGHT TO APPEAL;

(3) THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY;

(4) INDICTMENTS WERE BASED ON PERJURED TESTIMONY;

(5) IMPROPER INTRODUCTION OF A STATEMENT OF AN ALLEGED CO-CONSPIRATOR;

(6) THE CONVICTION WAS BASED ON INSUFFICIENT EVIDENCE;

(7) AN INCULPATORY STATEMENT WAS ILLEGALLY INTRODUCED;

(8) ADMISSION OF PREJUDICIAL TESTIMONY REGARDING RELATOR'S REQUEST FOR AN ATTORNEY;

(9) THE IMPROPER DISPLAY OF INFLAMMATORY PICTURES;

(10) THE JUDGE'S RECEIPT OF SECRET EVIDENCE FROM THE DISTRICT ATTORNEY.

AFTER A LENGTHY HEARING BEFORE THE HONORABLE ETHAN ALLEN DOTY ON NOVEMBER 6, 1974, THE COURT GRANTED RELATOR LEAVE TO FILE AN APPEAL NUNC PRO TUNC TO THE PENNSYLVANIA SUPREME COURT AND TO FILE BRIEFS AND PRESENT ORAL ARGUMENT; THE PETITION FOR RELIEF UNDER THE POST-CONVICTION HEARING ACT WAS OTHERWISE DENIED. THE RELATOR AND THE COMMONWEALTH APPEALED FROM THIS ORDER.

RELATOR APPEALED TO THE SUPREME COURT OF PENNSYLVANIA ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL. THE COMMONWEALTH ALSO APPEALED FROM THE ORDER GRANTING LEAVE TO FILE A SECOND APPEAL. THE SUPREME COURT HELD THAT THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE POST-CONVICTION HEARING COURT'S FINDING THAT COUNSEL'S FAILURE TO FILE AN ADEQUATE BRIEF AND TO ARGUE THE APPEAL ORALLY DEPRIVED RELATOR OF EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN HIS INITIAL APPEAL, AND THUS LEAVE TO FILE A SECOND APPEAL WAS APPROPRIATELY GRANTED. FURTHER, THE COURT FOUND THAT THE EVIDENCE WAS SUFFICIENT TO SUSTAIN RELATOR'S CONVICTION AND THAT THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE COLOR SLIDES DEPICTING THE BODIES OF THE DECEASED. THE COURT ALSO HELD THAT SULLIVAN WAS EFFECTIVELY REPRESENTED BY COUNSEL AT TRIAL AND THAT JUDGE DOTY PROPERLY DISMISSED RELATOR'S OTHER CLAIMS. SULLIVAN V. COMMONWEALTH, 371 A.2D 468 (PA. 1977).

IN THE PRESENT PETITION FOR FEDERAL HABEAS CORPUS RELIEF RELATOR ALLEGES THE FOLLOWING GROUNDS:

(1) THE ADMISSION INTO EVIDENCE OF COLOR SLIDES WAS A DENIAL OF DUE PROCESS;

(2) THAT THE FACTUAL DATA UNDERLYING RELATOR'S CONVICTION WAS SO TOTALLY VOID OF EVIDENTIARY SUPPORT AS TO VIOLATE DUE PROCESS;

(3) DEFENSE COUNSEL HAD A CONFLICT OF INTEREST BECAUSE HE ALSO REPRESENTED TWO OTHER PERSONS CHARGED WITH THE SAME CRIME;

(4) COUNSEL WAS INEFFECTIVE BY FAILING TO OBJECT TO CERTAIN TESTIMONY;

(5) COUNSEL WAS INEFFECTIVE IN FAILING TO RESERVE OBJECTIONS TO THE OFFERING OF A SECRET MEMORANDUM TO THE TRIAL JUDGE;

(6) THE TRIAL JUDGE ERRED IN INSTRUCTING THE JURY ON DEGREE OF GUILT, AMOUNTING TO A DENIAL OF DUE PROCESS;

(7) THE FAILURE OF THE PROSECUTION TO DISCLOSE CERTAIN EVIDENCE DENIED HIM DUE PROCESS OF LAW.

THE EVIDENCE UPON WHICH THE CONVICTION WAS BASED

THE CONVICTION AROSE FROM THE EVENTS OF THE EVENING OF JUNE 17, 1966, AT WHICH TIME JOHN GOREY A UNION OFFICIAL OF TEAMSTER'S UNION LOCAL 107, AND HIS GIRLFRIEND, RITA JANDA, WERE THE VICTIMS OF AN ASSASSINATION-TYPE HOMICIDE CARRIED OUT IN GOREY'S OFFICE ON THE SECOND FLOOR OF THE LOCAL'S UNION HALL AND OFFICE BUILDING IN PHILADELPHIA, PENNSYLVANIA.

WE ADOPT THE SUPREME COURT OF PENNSYLVANIA'S STATEMENT OF THE FACTS AS AN ACCURATE AND ADEQUATE SUMMARY AS FOLLOWS:

"TWO FIREARMS WERE USED IN KILLING EACH OF THE VICTIMS, AND SHOTS FROM BOTH WEAPONS WERE FOUND IN EACH OF THE BODIES. THE WEAPONS WERE NEVER FOUND. NO FELONY OTHER THAN THE HOMICIDES WERE INVOLVED, AND THERE WERE NO WITNESSES TO THE KILLING, SO THAT THE COMMONWEALTH'S CASE WAS BASICALLY PRESENTED AND PREDICATED UPON CIRCUMSTANTIAL EVIDENCE.

"...ALL OF THE CIRCUMSTANCES CONSIDERED BY THE JURY AND DESCRIBED BY THE WITNESSES COVERED A SHORT PERIOD, ROUGHLY BETWEEN 5:55 P.M. AND 7:13 P.M., ON THE EVENING OF THE KILLING. THE DEFENDANT OFFERED NO EVIDENCE, SO THAT THE TESTIMONY PRESENTED BY THE COMMONWEALTH WAS SUBMITTED TO THE JURY WITHOUT CONTRADICTION.

"THE COMMONWEALTH'S PRINCIPAL WITNESS, FRANCIS MCGRATH, A MEMBER OF THE LOCAL, HAD BEEN EMPLOYED BY THE UNION AS JANITOR IN THE BUILDING INVOLVED AT THE TIME OF THE HOMICIDES, AND HAD HELD OFFICIAL POSITIONS IN THE UNION IN THE PAST. MCGRATH TESTIFIED THAT HE ARRIVED ON THE PREMISES AT ABOUT 5:55 P.M., AT WHICH TIME THE BUILDING'S PARKING LOT WAS VACANT EXCEPT FOR TWO AUTOMOBILES; THE DEFENDANT'S AND THAT OF ANOTHER MEMBER OF THE UNION, GREGORY CARCHIDI,[2] WHO WAS ALSO EMPLOYED BY THE LOCAL AS A JANITOR. THE DEFENDANT, SULLIVAN, AN OFFICIAL OF LOCAL 107, WAS THEN SITTING AT A DESK BESIDE A WINDOW IN THE SECOND STORY

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[2] CARCHIDI WAS ACQUITTED OF THE CHARGE OF MURDER AND CONSPIRACY BY A JURY ON JANUARY 26, 1968, AS WAS ANTHONY DI PASQUALE ON MARCH 14, 1968.

OFFICE OF ANOTHER UNION OFFICIAL. FROM THE WINDOW SULLIVAN HAD A VIEW OF THE PARKING LOT, AND HIS POSITION AT THE WINDOW WAS MAINTAINED WHILE MCGRATH ENTERED THE BUILDING, WENT UP TO THAT OFFICE ON THE SECOND FLOOR AND BEGAN HIS JANITORIAL WORK THERE. THE SWITCHBOARD FOR THE TELEPHONE LINES HAD BEEN ARRANGED FOR THE NIGHT SO THAT THE LINE LISTED AND USED FOR INCOMING CALLS HAVING TO DO WITH REGULAR UNION BUSINESS WAS PLUGGED IN TO RING THE EXTENSION TELEPHONE IN THE ROOM WHERE SULLIVAN WAS SITTING. ANOTHER LINE WITH A DIFFERENT CALL NUMBER HAD BEEN SET UP BY THE SWITCHBOARD OPERATOR TO RING IN GOREY'S ROOM, BY PREARRANGEMENT WITH GOREY'S KNOWLEDGE, SO THAT JOSEPH VERNICK, WHO WISHED TO SPEAK WITH GOREY, COULD REACH HIM BY CALLING THAT NUMBER AFTER 7 P.M. THAT EVENING. AS MCGRATH STARTED HIS CLEANING WORK, SULLIVAN ASKED HIM WHY HE WAS CLEANING THE BUILDING ON THIS NIGHT, WHICH WAS A FRIDAY, AND SUGGESTED THAT HE WAIT UNTIL SUNDAY NIGHT TO DO THE CLEANING, POINTING OUT THAT A UNION MEETING WAS SCHEDULED FOR SUNDAY DURING THE DAYTIME, SO THAT THE PLACE WOULD REQUIRE CLEANING AFTER THAT MEETING. THE VICTIMS, GOREY AND JANDA, ARRIVED BETWEEN 6:10 AND 6:15 P.M. AND WENT TO GOREY'S OFFICE ON THE SECOND FLOOR. THE WITNESS CONTAINUED (SIC) EMPTYING TRASH BASKETS AND WORKING HIS WAY FROM ONE ROOM TO THE NEXT AROUND THE SECOND STORY, GOING FROM THE OFFICE IN WHICH SULLIVAN WAS SITTING TO THE CONFERENCE ROOM WHICH WAS NEXT, BUT FOR AN AREAWAY, TO THE OFFICE IN WHICH THE VICTIMS THEN WERE.

"WHILE MCGRATH WAS IN THE CONFERENCE ROOM THE FOLLOWING THINGS HAPPENED: JOHN GOREY CAME IN AND HAD A CONVERSATION (WHICH IS NOT RELEVANT), AND LEFT. 'IN A MATTER OF SECONDS, A HALF A MINUTE' AFTER GOREY LEFT THE CONFERENCE ROOM, SULLIVAN ENTERED AND SAID AGAIN, 'WHY DON'T YOU LET IT GO UNTIL AFTER THE MEETING', SPEAKING OF THE CLEANING WORK THAT MCGRATH WAS DOING. THERE FOLLOWED A CONVERSATION WITH SULLIVAN ABOUT SOMETHING THAT JOHN GOREY HAD SAID, DURING WHICH CARCHIDI CAME INTO THE CONFERENCE ROOM AT A TIME ESTIMATED TO BE A MATTER OF A MINUTE OR TWO AFTER SULLIVAN HAD MADE HIS ENTRANCE.

"UPON CARCHIDI'S ENTRANCE NO GREETINGS WERE EXCHANGED BETWEEN HIM AND SULLIVAN. IN FACT, NEITHER OF THEM MADE ANY COMMENT TO THE OTHER. INSTEAD, CARCHIDI SPOKE DIRECTLY TO MCGRATH, STATING IN SULLIVAN'S PRESENCE JUST ABOUT WHAT SULLIVAN HAD JUST SAID: '...LEAVE THE CLEANING GO UNTIL SUNDAY AFTER THE MEETING.' SULLIVAN THEN LEFT THE CONFERENCE ROOM. MCGRATH TESTIFIED THAT SULLIVAN'S DEPARTURE WAS 'FROM THREE TO FIVE MINUTES, APPROXIMATELY', AFTER GOREY HAD LEFT; THAT HE THEN CONTINUED HIS CLEANING, AND THAT CARCHIDI 'REMINDED ME AGAIN TO LET THE CLEANING GO UNTIL AFTER SUNDAY.' IT WAS AT THIS POINT THAT MCGRATH HEARD 'WHAT I BELIEVED TO BE FIRECRACKERS... I HEARD A LOT OF NOISE, LOUD REPORTS, WHICH I THOUGHT WERE FIRECRACKERS...JUST LIKE I SAID, YOUR HONOR, IT WAS A BUNCH OF NOISES SIMULTANEOUSLY. DON'T KNOW HOW TO SAY THE WORD, BUT IF YOU LIGHT A WHOLE PACK OF FIRECRACKERS AND

THROW THEM ON THE FLOOR AND THEY WOULD GO OFF ONE RIGHT AFTER ANOTHER.' IN THIS CHARGED ATMOSPHERE MCGRATH TURNED TO CARCHIDI WHO WAS SEATED IN THE CHAIR BEHIND HIM AND EXCLAIMED, 'WHAT WAS THAT?' WHEREUPON CARCHICI (SIC) STATED, 'GET OUT OF THE BUILDING AND DON'T SAY NOTHING'. MCGRATH GOT OUT OF THE BUILDING AND NOTICED THAT THE CARS THAT HAD BEEN ON THE PARKING LOT PREVIOUSLY, GOREY'S, SULLIVAN'S AND CARCHIDI'S, WERE STILL THERE, BUT AT THIS TIME THERE WAS ANOTHER CAR ALSO ON THE LOT. MCGRATH FIXED THE TIME OF HIS DEPARTURE AS BETWEEN 7:05 AND 7:15 P.M. HE TESTIFIED THAT, BECAUSE OF HIS HASTY DEPARTURE, DOORS TO THE ROOMS ON THE SECOND FLOOR WHERE HE HAD BEEN WORKING HAD BEEN LEFT OPEN AND THE LIGHTS WERE LEFT ON WHEN HE LEFT THE BUILDING. HE RETURNED 15 TO 20 MINUTES LATER AND OBSERVED THAT THE AUTOMOBILES OF SULLIVAN AND CARCHIDI, AND THE THIRD CAR, HAD VACATED THE PARKING LOT, LEAVING ONLY THE AUTOMOBILE OF JOHN GOREY; IN ADDITION, ALL OF THE DOORS INSIDE THE BUILDING HAD BEEN CLOSED, AND ALL OF THE LIGHTS HAD BEEN TURNED OFF. THE DOOR TO THE CONFERENCE ROOM WHICH HAD BEEN LEFT OPEN WAS NOW CLOSED AND LOCKED.

"OTHER WITNESSES GAVE TESTIMONY WHICH SERVED TO ADD IMPORTANT THREADS AND DETAILS IN THE FABRIC OF CIRCUMSTANTIAL EVIDENCE. FOR EXAMPLE, WHEN IRENE GLENN TELEPHONED, DIALING IN ON THE PRINCIPAL TELEPHONE LINE OF THE UNION (WHICH LINE, AS PREVIOUSLY NOTED HAD BEEN SET UP TO RING AT THE DESK WHERE SULLIVAN WAS THEN SITTING), THE CALL WAS ANSWERED BY ONE WHO

STATED THAT HE WAS GOREY. HER RECOLLECTION WAS THAT THIS RECIPIENT OF HER CALL GAVE HIS NAME AS 'BILL' GOREY; AND, WHILE SHE WAS NOT SURE WHICH FIRST NAME HE GAVE, SHE WAS QUITE POSITIVE THAT THE LAST NAME GIVEN WAS 'GOREY'. IT WAS UNCONTESTED THAT SULLIVAN HAD WRITTEN HER NAME AND TELEPHONE NUMBER ON A CERTAIN YELLOW SHEET OF PAPER WHICH WAS FOUND IN THE WASTE BASKET IN THAT OFFICE. COUPLED WITH THIS WAS THE FACT THAT HER CALL WAS AT 6:15 P.M., JUST SHORTLY AFTER THE VICTIMS HAD ARRIVED.

"JOSEPH VERNICK, TRYING TO REACH GOREY, MADE HIS CALL TO THE NUMBER WHICH WAS GIVEN TO HIM BY THE UNION'S TELEPHONE SWITCHBOARD OPERATOR, ESTHER SNYDER. SHE TESTIFIED THAT SHE HAD PLUGGED THIS LINE INTO GOREY'S OFFICE WITH HIS KNOWLEDGE, SO THAT, PRESUMABLY, HE WAS EXPECTING THE CALL WHICH REMAINED UNANSWERED THAT EVENING, APPARENTLY AFTER HIS AND RITA JANDA'S DEATHS. VERNICK RANG THROUGH ON THIS LINE TO GOREY'S TELEPHONE SEVERAL TIMES, RECEIVING NO ANSWER, OVER A PERIOD FROM 7:15 TO 8:15 P.M."

I.

THE SUFFICIENCY OF THE EVIDENCE

RELATOR URGES THAT THE EVIDENCE SET FORTH ABOVE WAS INSUFFICIENT TO SUSTAIN A VERDICT OF FIRST DEGREE MURDER. IN THIS CASE, THE COMMONWEALTH RELIED TOTALLY ON CIRCUMSTANTIAL EVIDENCE. OF COURSE, CIRCUMSTANTIAL EVIDENCE IN ITSELF MAY BE SUFFICIENT TO ESTABLISH BOTH THE COMMISSION OF A CRIME AND THE ACCUSED'S PARTICIPATION IF THE INFERENCES ARISING FROM THE

EVIDENCE ESTABLISH THESE FACTS BEYOND A REASONABLE DOUBT. COMMONWEALTH v. COX, 460 PA. 566, 333 A.2D 917 (1975); COMMONWEALTH v. ALSTON, 461 PA. 664, 337 A.2D 597 (1975). MOREOVER, IT IS NOT NECESSARY THAT EACH PIECE OF EVIDENCE BE LINKED TO THE DEFENDANT BEYOND A REASONABLE DOUBT. IT IS ONLY NECESSARY THAT EACH PIECE OF EVIDENCE INCLUDE THE DEFENDANT IN A GROUP WHO COULD BE LINKED WHILE EXCLUDING OTHERS, AND THAT THE COMBINATION OF EVIDENCE LINKED THE DEFENDANT TO THE CRIME BEYOND A REASONABLE DOUBT (EMPHASIS SUPPLIED). COMMONWEALTH v. PETRISKO, 442 PA. 575, 580, 275 A.2D 46, 49 (1971). SEE ALSO COMMONWEALTH v. TINSLEY, 465 PA. 329, 350 A.2D 791 (1976). AS STATED, THE FACTS AND CIRCUMSTANCES NEED NOT BE ABSOLUTELY INCOMPATABLE (SIC) WITH DEFENDANT'S INNOCENCE, BUT THE QUESTION OF ANY DOUBT IS FOR THE JURY UNLESS THE EVIDENCE "BE SO WEAK AND INCONCLUSIVE THAT AS A MATTER OF LAW NO PROBABILITY OF FACT CAN BE DRAWN FROM THE COMBINED CIRCUMSTANCES." COMMONWEALTH v. LIBONATI, 346 PA. 504, 508, 31 A.2D 95, 97 (1943). SEE ALSO COMMONWEALTH v. ROGOZINSKI, 387 PA. 399, 402, 128 A.2D 28, 30 (1956). MY REVIEW OF THE STATE COURT'S FINDINGS DEALING WITH THIS PART OF THE CASE INDICATES THAT AN ANALYSIS OF THE FACTS SUPPORTS THE JURY'S FINDINGS. SULLIVAN HAD REMAINED AT THE WINDOW LOOKING OUT ONTO THE PARKING LOT FOR MORE THAN TWENTY (20) MINUTES AFTER MCGRATH'S ARRIVAL, INDICATING THAT HE WAS AWAITING THE ARRIVAL OF A PARTICULAR INDIVIDUAL. SULLIVAN DID

NOT LEAVE THAT OBSERVATION POINT UNTIL HE HAD SEEN THE VICTIMS ARRIVE, STRONGLY SUGGESTING THAT IT WAS IN FACT GOREY AND JANDA WHOSE ARRIVAL HE WAS AWAITING. THE EVIDENCE FURTHER JUSTIFIES AN INFERENCE THAT SULLIVAN ATTEMPTED TO CONCEAL HIS IDENTITY AND PRESENCE BY ANSWERING THE TELEPHONE AS "GOREY". MOREOVER, HE ATTEMPTED TO PERSUADE MCGRATH TO LEAVE THE PREMISES BY REPEATEDLY SUGGESTING THAT THE CLEANING BE LEFT UNTIL SUNDAY. SUCH CONDUCT IS HIGHLY CONSISTENT WITH AN ATTEMPT TO AVOID THE POSSIBILITY OF ANY WITNESSES TO THE ANTICIPATED EVENT.

THIS CONCLUSION IS BUTTRESSED BY THE ACTIONS OF CARCHIDI, A CO-DEFENDANT, WHO ENTERED THE CONFERENCE ROOM AND WITHOUT ENGAGING IN DISCUSSION WITH RELATOR, ALSO INSTRUCTED MCGRATH TO DEFER HIS DUTIES UNTIL SUNDAY. ALMOST IMMEDIATELY THEREAFTER, RELATOR EXITED THE CONFERENCE ROOM THROUGH THE SAME DOORWAY WHICH GOREY HAD PREVIOUSLY DEPARTED, AND WAS (SIC) LED TOWARDS GOREY'S OFFICE, THE SCENE OF THE MURDERS. MOMENTARILY, THE SHOTS WERE HEARD AND CARCHIDI TOLD MCGRATH TO "...GET OUT OF THE BUILDING AND DON'T SAY NOTHING" (SIC). A REASONABLE INFERENCE WAS PROPERLY DRAWN BY THE JURY THAT THE REPETITION AND SIMILARITY OF THESE STATEMENTS TO MCGRATH BY RELATOR AND CARCHIDI JUST PRIOR TO THE SHOOTINGS WAS INDICATIVE OF THEIR KNOWLEDGE OF THE IMPENDING INCIDENT AND FURTHER EVIDENCED THEIR ATTEMPTS TO REMOVE ANY POTENTIAL WITNESSES TO THE CRIME.

ADDITIONAL EVIDENCE OF GUILT WAS ALSO PROPERLY INFERRED FROM RELATOR'S STATEMENT TO POLICE. DURING QUESTIONING SEVERAL DAYS AFTER THE MURDERS, SULLIVAN DENIED BEING PRESENT AT THE BUILDING DURING THE TIME OF THE SHOOTINGS. THIS CONTRADICTED MCGRATH'S STATEMENT WHICH PLACED SULLIVAN IN DIRECT PROXIMITY TO THE CRIME ONLY MOMENTS BEFORE ITS OCCURRENCE. MOREOVER, MCGRATH STATED THAT WHEN HE LEFT THE BUILDING SULLIVAN'S CAR WAS STILL PARKED IN THE LOT.

DISCUSSION

IT IS CLEAR THAT WE CANNOT REVIEW THE SUFFICIENCY OF THE EVIDENCE IN SUPPORT OF RELATOR'S CONVICTION AT A FEDERAL HABEAS CORPUS PROCEEDING. THE QUESTION PRESENTED TO A FEDERAL COURT BY SUCH A CLAIM, IN THE WORDS OF THOMPSON V. CITY OF LOUISVILLE, 362 U.S. 199 (1960) IS WHETHER:

> "...THE CHARGES...WERE SO TOTALLY DEVOID EVIDENTIARY SUPPORT AS TO RENDER (THE) CONVICTION UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. DECISION ON THIS QUESTION TURNS NOT ON THE SUFFICIENCY OF THE EVIDENCE, BUT ON WHETHER THE CONVICTION RESTS UPON ANY EVIDENCE AT ALL." SEE ALSO UNITED STATES OF AMERICA EX REL. FINEBERG V. RUNDLE, 444 F.2D 402 (3RD CIR. 1971); UNITED STATES EX REL. JOHNSON V. RUNDLE, 280 F. SUPP. 453 (E.D. PA.) AFF'D 404 F.2D 42 (3RD CIR. 1968), CERT DENIED, 395 U.S. 937 (1969). (EMPHASIS ADDED.)

CLEARLY IN THE INSTANT CASE, THERE IS NO SUCH LACK OF EVIDENCE AS TO CAST ANY DOUBT ON THE STATEMENT OF THE SUPREME COURT OF PENNSYLVANIA THAT "THESE FACTS....TAKEN IN CONSORT WITH

ALL REASONABLE INFERENCES, THEY CLEARLY JUSTIFY THE CONCLUSION THAT APPELLANT WAS LINKED TO THE CRIME BEYOND A REASONABLE DOUBT...."

II.

THE ADMISSION OF COLOR SLIDES OF THE TWO DEAD BODIES

RELATOR NEXT ALLEGES ERROR BY THE TRIAL COURT FOR ADMITTING INTO EVIDENCE COLOR SLIDES DEPICTING THE BODIES OF THE VICTIMS. LAW ON THIS SUBJECT IS WELL SETTLED THAT THE ADMISSION OF THIS TYPE OF EVIDENCE IS WITHIN THE DISCRETION OF THE TRIAL COURT AND ABSENT AN ABUSE OF THAT DISCRETION, THERE IS NO REVERSIBLE ERROR. COMMONWEALTH V. WOODS, 454 PA. 250, 252, 311 A.2D 582, 583 (1973); COMMONWEALTH V. DICKERSON, 406 PA. 102, 176 A.2D 421 (1962). MOREOVER, THE PROPER TEST TO BE APPLIED BY A TRIAL COURT IN DETERMINING THE ADMISSIBILITY OF PHOTOGRAPHS IN HOMICIDE CASES IS WHETHER OR NOT THE PHOTOGRAPHS ARE OF SUCH EVIDENTIARY VALUE THAT THEIR NEED CLEARLY OUTWEIGHS THEIR LIKELIHOOD OF INFLAMING THE MINDS AND PASSIONS OF THE JURORS. COMMONWEALTH V. POWELL, 428 PA. 275, 278 (1968). HOWEVER, SUCH PHOTOGRAPHS WILL NOT BE EXCLUDED MERELY BECAUSE THEY ARE UNPLEASANT OR GRUESOME. COMMONWEALTH V. SCARAMUZZINO, 455 PA. 378, 381 (1974). IN THE INSTANT CASE, THE COMMONWEALTH THEORY SUBSTANTIATED BY BALLISTIC EVIDENCE WAS THAT THE VICTIMS WERE KILLED BY SHOTS FROM TWO DIFFERENT WEAPONS AND THAT EACH PERSON WAS HIT BY SHOTS FROM BOTH GUNS. RECONSTRUCTING THE SHOOTINGS THROUGH THESE SLIDES THE PROSECUTION SOUGHT TO PROVE THAT NEITHER VICTIM COULD HAVE

SHOT THE OTHER, THAT GOREY WAS THE PRINCIPAL TARGET AND JANDA WAS SHOT WHILE SHE WAS ATTEMPTING TO HIDE BENEATH HER DESK TO AVOID THE EXISTENCE OF A WITNESS TO THE KILLING OF GOREY. THUS THE EVIDENCE WAS OFFERED TO AID THE JURY IN UNDERSTANDING THE PHYSICAL SCENE OF THE CRIME, THE NATURE AND EXTENT OF THE WOUNDS INFLICTED AND THE BRUTALITY OF THE MURDER TO GRAPHICALLY DEMONSTRATE THE EXISTENCE OF AN ATTEMPT TO TAKE LIFE.

MOREOVER, AS A GENERAL RULE, QUESTIONS INVOLVING THE ADMISSION OF EVIDENCE ARE NOT SUBJECT TO REVIEW BY A FEDERAL COURT IN A HABEAS CORPUS PROCEEDING INITIATED BY A STATE PRISONER UNLESS THERE IS AN ERROR OF SUCH MAGNITUDE AS TO DENY FUNDAMENTAL FAIRNESS TO THE CRIMINAL TRIAL. BURGETT V. TEXAS, 389 U.S. 109, 113-114 (1967); UNITED STATES EX REL. HARRIS V. ILLINOIS, 457 F.2D 191, 198 (7TH CIR. 1972); WILLIAMS V. WAINWRIGHT, 427 F.2D 921 (5TH CIR. 1970). WITHOUT INTENDING TO ENNUNCIATE (SIC) AN ALL INCLUSIVE RULE, I RECOMMEND THAT THE EVIDENCE OF THE COLOR SLIDES ADMITTED HERE DID NOT INFRINGE UPON THE FAIRNESS OF SULLIVAN'S TRIAL. SPENCER V. TEXAS, SUPRA. FURTHERMORE, IT IS WELL SETTLED THAT ERRORS COMMITTED DURING THE TRIAL OF A CRIMINAL CASE IN A STATE COURT ARE NOT SUBJECT TO REVIEW IN A HABEAS CORPUS PROCEEDING IN A FEDERAL COURT UNLESS "IT IS SHOWN THAT THE ERRORS WERE SO CONSPICUOUSLY PREJUDICIAL AS TO DEPRIVE THE DEFENDANT OF A FAIR TRIAL." UNITED STATES EX REL. CANNON V. MARONEY, 373 F.2D 908, 910 (3RD CIR. 1967).

III.

THE CALIBER OF LEGAL REPRESENTATION BY RELATOR'S COUNSEL

IN A CRIMINAL TRIAL THE ACCUSED IS ENTITLED TO THE ASSISTANCE OF COUNSEL IN HIS DEFENSE. UNITED STATES CONSTITUTION AMENDMENT VI. THIS PRINCIPLE IS APPLICABLE IN STATE, AS WELL AS FEDERAL PROCEEDINGS. GIDEON V. WAINWRIGHT, 372 U.S. 335 (1963). MOREOVER, THE QUALITY OF REPRESENTATION, WHICH IS REQUIRED IN ORDER TO MEET THE CONSTITUTIONAL STANDARDS MANDATED, MUST BE EFFECTIVE AND COMPETENT, AND NOT MERELY PREFUNCTORY OR CHARADE-LIKE IN CHARACTER. POWELL V. ALABAMA, 287 U.S. 485, 68, 71 (1932). WHILE THE SUPREME COURT HAS NOT ARTICULATED MORE PRECISE GUIDELINES WITH RESPECT TO THE QUALITY OF REPRESENTATION WHICH IS REQUIRED IN ORDER TO MEET DUE PROCESS AND FOURTEENTH AMENDMENT STANDARDS, VARIOUS COURTS OF APPEAL HAVE DONE SO. THE THIRD CIRCUIT, ALONG WITH THE FOURTH, FIFTH AND DISTRICT OF COLUMBIA CIRCUITS HAS TAKEN A STRICT VIEW OF THE MINIMAL STANDARD OF THE QUALITY OF REPRESENTATION WHICH MUST BE PROVIDED. THE REQUIREMENT IN THE THIRD CIRCUIT IS REASONABLE COMPETENCY. THIS PRECEPT WAS FIRST ENNUNCIATED (SIC) IN MOORE V. UNITED STATES, 432 F.2D 730, 737 (3RD CIR. 1970), OVERRULING UNITED STATES EX REL. CAREY V. RUNDLE, 409 F.2D 1210 (3RD CIR. 1969), CERT DENIED 397 U.S. 496 (1970), AND UNITED STATES EX REL. DARCY V. HANDY. 203 F.2D 407 (3RD CIR. 1953) "FARCE OR MOCKERY OF JUSTICE". SEE UNITED STATES EX REL. GREEN V. RUNDLE, 434 F.2D 1112 (3RD CIR. 1970). SEE ALSO UNITED STATES EX REL. NAVARRO V. JOHNSTON, 365 F. SUPP. 676 (E.D. PA. 1973). THE INQUIRY DOES NOT GO SIMPLY TO THE LEVEL OF

COMPETENCY, SINCE EVEN WHEN THERE IS NORMALLY COMPETENT REPRESENTATION THERE MAY BE ERRORS ON THE PART OF COUNSEL. RATHER, THE INQUIRY IS WHETHER THE ERRORS, IF ANY, WERE IN FACT, EGREGIOUS AND PREJUDICIAL. UNITED STATES EX REL. GREEN V. RUNDLE, SUPRA, AT 1113.[3] RELATOR HAS RAISED A NUMBER OF GROUNDS IN WHICH HE ALLEGES THAT HIS TRIAL COUNSEL WAS INEFFECTIVE AND INCOMPETENT. A SERIATIM REVIEW OF THE POINTS RAISED BY RELATOR FOLLOWS:

A. RELATOR CONTENDS INITIALLY THAT IT WAS ERROR FOR THE COURT TO EXPRESS ITS OPINION AS TO THE DEGREE OF GUILT INVOLVED IN THE CRIME. AS PREVIOUSLY NOTED, THE TEST FOR DETERMINING THE EFFECTIVENESS OF COUNSEL IS BASED UPON REASONABLE COMPETENCY.

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[3] "THE MOORE STANDARD IS COMPREHENSIVELY SET FORTH IN THE FOLLOWING PASSAGE FROM THE OPINION:

> A RETROSPECTIVE EXAMINATION OF A LAWYER'S REPRESENTATION TO DETERMINE WHETHER IT WAS FREE FROM ANY ERROR WOULD EXACT A HIGHER MEASURE OF COMPETENCY THAN THE PREVAILING STANDARD. PERFECTION IS HARDLY ATTAINABLE AND CERTAINLY IS NOT THE GENERAL RULE, ESPECIALLY IN PROFESSIONAL WORK WHERE INTUITIVE JUDGMENTS AND SPONTANEOUS DECISIONS ARE OFTEN REQUIRED IN VARYING CIRCUMSTANCES. THE ARTISTRY OF THE ADVOCATE IS DIFFICULT TO JUDGE RETROSPECTIVELY BECAUSE THE ELEMENTS INFLUENCING JUDGMENT USUALLY CANNOT BE CAPTURED ON THE RECORD. THE KALEIDOSCOPIC RANGE OF POSSIBILITIES OFTEN SEEMS LIMITLESS, AND IT IS PROVERBIAL THAT THE FINEST IDEAS EMERGE ON THE WAY BACK FROM THE COURTHOUSE. THE ADVOCATE'S WORK, THEREFORE, IS NOT READILY CAPABLE OF LATER AUDIT LIKE A BOOKKEEPER'S. OF COURSE, NOT ALL THE ACTIVITY OF THE ADVOCATE HAS THIS HIGHLY SUBJECTIVE QUALITY. IT IS POSSIBLE TO EXAMINE THE SUFFICIENCY OF HIS PREPARATION AND THE ADEQUACY OF HIS KNOWLEDGE OF THE RELEVANT LAW. REVIEW MAY DISCLOSE FAILURES AT THE TRIAL. ALL THESE ARE MATTERS WHICH WILL INFORM THE JUDGMENT ON A RETROSPECTIVE INQUIRY WHETHER COUNSEL ADEQUATELY PERFORMED HIS DUTY. BUT SINCE WHAT IS REQUIRED IS NORMAL AND NOT EXCEPTIONAL REPRESENTATION, THERE IS ROOM FOR THE REALIZATION THAT IT WOULD BE DIFFICULT TO FIND A CASE WHERE EVEN THE ABLEST AND MOST EXPERIENCED TRIAL LAWYER WOULD BE COMPLETELY SATISFIED AFTER A SEARCHING RE-EXAMINATION OF HIS CONDUCT OF A CASE."

MOORE V. UNITED STATES, 432 F.2D 730, 736-37 (3D CIR. 1970). (EMPHASIS ADDED.)

MOORE V. UNITED STATES, SUPRA. AT THE TIME OF RELATOR'S TRIAL, THE LAW PERMITTED THE TRIAL JUDGE TO EXPRESS HIS OPINION IN THE CASE.[4]

> "...IT IS ALWAYS THE PRIVILEGE AND SOMETIMES THE DUTY OF A TRIAL JUDGE TO EXPRESS HIS OWN OPINION, INCLUDING HIS OPINION OF THE WEIGHT AND THE EFFECT OF THE EVIDENCE OR ITS POINTS OF STRESS AND WEAKNESS OR EVEN THE GUILT OR INNOCENCE OF THE DEFENDANT AND THE VERDICT WHICH IN HIS JUDGMENT, THE JURY SHOULD RENDER." COMMONWEALTH V. OTT, 417 PA. 269, 272 (1965) QUOTING COMMONWEALTH V. CHAMBERS, 367 PA. 159, 164 (1951). (EMPHASIS ADDED.)

MOREOVER, THIS OPINION OR COMMENT IS REQUIRED TO BE FAIRLY OR TEMPERATELY STATED, CLEARLY LEAVING THE JURY FREE TO REACH AN INDEPENDENT CONCLUSION.

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[4] IN SUPPORT OF HIS POSITION RELATOR RELIES UPON THE SUPREME COURT OF PENNSYLVANIA'S DECISION IN COMMONWEALTH V. ARCHANBALT, 448 PA. 90, 290 A.2D 72 (1972) AND COMMONWEALTH V. GOINS, 457 PA. 594, 321 A.2D 913 (1974), BOTH OF WHICH WERE DECIDED SEVERAL YEARS AFTER RELATOR'S TRIAL. HOWEVER, EVEN ASSUMING ARGUENDO THESE DECISIONS APPLY RETROACTIVELY AND THAT COUNSEL SHOULD HAVE POSSESSED THE FORESIGHT TO ANTICIPATE THEM, I BELIEVE THIS RELIANCE IS MISPLACED. IN ARCHANBALT, SUPRA, THE COURT ANNOUNCED A NEW RULE THAT THE TRIAL JUDGE COULD NO LONGER EXPRESS AN OPINION AS TO THE GUILT OR INNOCENCE OF AN ACCUSED. THERE IS NO EVIDENCE THAT THE TRIAL JUDGE EXPRESSED SUCH AN OPINION IN THIS CASE WITH RESPECT TO RELATOR AND THUS THAT CASE IS INAPPLICABLE. IN GOINS, SUPRA, THE ACCUSED HAD ADMITTED COMMITTING THE HOMICIDE BUT ASSERTED THE DEFENSES OF INTOXICATION AND INSANITY IN AN EFFORT TO LESSEN THE DEGREE OF GUILT. FOUR MEMBERS OF THE SUPREME COURT OF PENNSYLVANIA EXPRESSED THE VIEW THAT IT WAS INAPPROPRIATE FOR THE COURT TO COMMENT UPON THE DEGREE OF GUILT WHERE THAT WAS THE ONLY ISSUE FOR THE JURY TO DECIDE. RELATOR HOWEVER CONCEDED AT THE TRIAL THAT THE CRIME AMOUNTED TO FIRST DEGREE MURDER BUT BASED HIS DEFENSE UPON THE THEORY THAT THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH HIS GUILT. THUS, THE PRINCIPLE ANNOUNCED IN GOINS, SUPRA, IS LIKEWISE INAPPLICABLE HERE.

I BELIEVE THIS TEST WAS SATISFIED. AFTER HIS COMMENTS, THE COURT REPEATEDLY REMINDED THE JURORS THAT HE WAS MERELY STATING HIS OPINION, THE REMARKS WERE NOT BINDING UPON THEM AND THAT THE ULTIMATE DETERMINATION OF THE FACTS AND THE VERDICT WAS SOLELY THAT OF THE PANEL.

ADDITIONALLY, THE CASE SUB JUDICE COMES TO THIS COURT ON COLLATERAL ATTACK FROM A STATE CONVICTION. IN THAT CIRCUMSTANCE, A DIFFERENT STANDARD OF REVIEW APPLIES.

AS THE SUPREME COURT OBSERVED IN SPLAWN V. CALIFORNIA, ___ U.S. ___, 45 USLW 4574, 4575 (US JUNE 1977), WHERE THE PROSECUTIONS OCCUR IN FEDERAL COURTS:

> "(O)UR AUTHORITY TO REVIEW JURY INSTRUCTIONS IS A GOOD DEAL BROADER THAN IS OUR POWER TO UPSET STATE COURT CONVICTIONS BY REASON OF INSTRUCTIONS GIVEN DURING THE COURSE OF A TRIAL. SEE CUPP V. NAUGHTEN, 414 U.S. 141 (1973); HENDERSON V. KIBBE, ___ U.S. ___. WE CAN EXERCISE THE LATTER AUTHORITY ONLY IF THE INSTRUCTION RENDERS THE SUBSEQUENT CONVICTION VIOLATIVE OF THE UNITED STATES CONSTITUTION." (EMPHASIS ADDED.)

IN HENDERSON V. KIBBE, ___ U.S. ___, 45 USLW 4457 (US MAY 16, 1977), ALSO A HABEAS CORPUS CASE, THE COURT OF APPEALS RELIED ON IN RE WINSHIP, 397 U.S. 358 (1970) IN REVERSING THE DENIAL OF A WRIT. THE APPELLATE COURT HAD CONCLUDED THAT FAILURE OF THE STATE TRIAL COURT TO CHARGE ON CAUSATION IN A COMPLEX HOMICIDE CASE HAD RESULTED IN "AN IMPERMISSIBLE RISK THAT THE JURY HAD NOT MADE A FINDING THAT THE CONSTITUTION REQUIRES." 45 USLW AT 4459. IN REVERSING, THE SUPREME COURT STATED:

> "THE BURDEN OF DEMONSTRATING AN ERRONEOUS INSTRUCTION WAS SO PREJUDICIAL THAT IT WILL SUPPORT A COLLATERAL ATTACK ON THE CONSTITUTIONAL VALIDITY OF A STATE COURT'S JUDGMENT IS EVEN GREATER THAN THE SHOWING REQUIRED TO ESTABLISH PLAIN ERROR ON DIRECT APPEAL." 45 USLW AT 4460.

IT IS MY JUDGMENT THAT RELATOR HAS NOT MET HIS BURDEN OF DEMONSTRATING THAT THE INSTRUCTION OF THE COURT WAS SO PREJUDICIAL AS TO BE VIOLATIVE OF THE UNITED STATES CONSTITUTION.

B. RELATOR'S NEXT CONTENTION IS THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE INTRODUCTION OF EVIDENCE THAT RELATOR HAD EXERCISED IN HIS RIGHT TO REMAIN SILENT UNTIL HE HAD OBTAINED COUNSEL. SGT. HUESTON TESTIFIED FOR THE COMMONWEALTH AT THE TRIAL OF RELATOR ON JUNE 22, 1966. ON DIRECT EXAMINATION HE WAS ASKED THE FOLLOWING QUESTIONS AND GAVE THE FOLLOWING ANSWERS:

> "Q. (BY MR. SPRAGUE) YOU THEN ASKED THE DEFENDANT DID HE KNOW JOHN GOREY, AND WHAT WAS STATED?
>
> "A. (BY DETECTIVE HUESTON) HE SAID HE AND JOHN GOREY WERE BUSINESS ASSOCIATES, BUT HE WASN'T IN THE BUILDING WHEN GOREY WAS KILLED.
>
> "WE THEN ASKED HIM WHERE HE WAS. HE SAID THAT HE WOULD ANSWER NO FURTHER QUESTIONS UNTIL HE CALLED AN ATTORNEY.
>
> "Q. DID YOU THEN CONTACT AN ATTORNEY?
>
> "A. HE THEN CALLED AN ATTORNEY." (N.T. TRIAL, 469 TO 470).

IN DEALING WITH THIS PARTICULAR ISSUE THE SUPREME COURT OF PENNSYLVANIA REFUSED TO REACH THE MERITS OF THIS CLAIM. THE COURT STATED:

> "ALTHOUGH THIS GROUND FOR RELIEF WAS ALLEGED IN THE AMENDED P.C.H.A. PETITION, IT WAS NOT PURSUED AT THE TIME OF THE HEARING NOR WAS IT DISCUSSED IN THE BRIEF TO THE HEARING COURT. ACCORDINGLY, WE WILL NOT CONSIDER THE QUESTION ON APPEAL...."

IT IS THUS INCUMBENT UPON THIS COURT TO DETERMINE WHETHER OR NOT ON THIS PARTICULAR GROUND RELATOR HAS EXHAUSTED HIS STATE REMEDIES.

THE SUPREME COURT'S DECISION IN PICARD V. CONNOR, 404 U.S. 270 (1971) PROVIDES THE INITIAL STEP IN MY ANALYSIS. CONNOR CONTENDED TO THE STATE COURT THAT HIS STATE-COURT CONVICTION WAS INVALID BECAUSE THE PROSECUTION HAD NOT BEEN INSTITUTED AS A RESULT OF AN INDICTMENT RETURNED BY A GRAND JURY. HE CLAIMED THAT THE GRAND JURY CLAUSE OF THE FIFTH AMENDMENT HAD BEEN INCORPORATED WITHIN THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, THUS MAKING IT APPLICABLE TO THE STATE. THIS ARGUMENT WAS REJECTED BY THE STATE COURTS AND CONNOR PETITIONED FOR A FEDERAL HABEAS RELIEF. A SEPARATE EQUAL PROTECTION CLAIM WAS SUGGESTED FOR THE FIRST TIME IN THE FEDERAL COURT. THE SUPREME COURT REVERSED THE COURT OF APPEALS, RULING THAT A FEDERAL HABEAS CORPUS COURT MAY NOT ENTERTAIN AN ISSUE PRESENTED TO IT UNLESS THE "SAME CLAIM" HAD BEEN URGED UPON THE STATE COURTS. IN ORDER TO MEET THIS STANDARD, THE SUPREME COURT STATED THAT THE ARGUMENT BROUGHT BEFORE THE FEDERAL COURT MUST BE "THE SUBSTANTIAL EQUIVALENT" OF A CLAIM ALREADY PRESENTED TO THE STATE COURTS; "THE SUBSTANCE OF" THE CLAIM RAISED IN THE

FEDERAL COURT MUST HAVE FIRST BEEN SUBMITTED TO THE STATE COURT. ID. AT 277, 278. FOLLOWING THESE GUIDELINES, THE SUPREME COURT HELD THAT STATE-COURT REMEDIES HAD NOT BEEN EXHAUSTED BY CONNOR WITH REGARD TO THE EQUAL PROTECTION CONTENTION.

LATER DECISIONS OF THE SUPREME COURT ARE HELPFUL IN CLARIFYING THE SCOPE OF THE WORD "CLAIM" IN DETERMINING WHETHER A CONTENTION HAS FIRST BEEN TENDERED TO THE STATE COURTS FOR PURPOSES OF EXHAUSTION. THE COURT HAS OBSERVED THAT THE "METHOD OF ANALYSIS" ASSERTED IN THE FEDERAL COURT MUST HAVE BEEN "READILY AVAILABLE TO THE STATE COURT". STANLEY V. ILLINOIS, 405 U.S. 645, 658 N. 10 (1972) (DICTUM). IT HAS BEEN HELD THAT THE PETITIONER MUST GIVE THE STATE SYSTEM THE OPPORTUNITY TO RESOLVE THE FEDERAL CONSTITUTION "ISSUES" BEFORE HE GOES TO THE FEDERAL COURT FOR HABEAS RELIEF.[5] IN FRANCISCO, THE SUPREME COURT HELD THAT THE "ISSUES" RAISED BY THE PETITIONER IN A FEDERAL HABEAS COURT HAD BEEN EXHAUSTED IN THE STATE COURTS. THE INTERVENTION OF A DECISION BY THE STATE SUPREME COURT THAT ARGUABLY WOULD HAVE AFFORDED THE PETITIONER RELIEF IN THE STATE COURTS WAS HELD NOT TO PRECLUDE FEDERAL HABEAS REVIEW. SEE ALSO PITCHESS V. DAVIS, 421 U.S. 482, 487 (1975) (PER CURIAM). WITHIN THE CONTOURS OF A PARTICULAR ARGUMENT, HOWEVER, NOT EVERY DETAIL NEED HAVE TO BE PUT BEFORE THE STATE COURT IN ORDER TO PRESENT ALL FACETS OF THE ARGUMENT TO THE FEDERAL COURT ON A PETITION FOR HABEAS. SMITH V. GOGUEN, 415 U.S. 566, 576-77 (1974) (DICTUM).

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[5] FRANCISCO V. GATHRIGHT, 419 U.S. 59, 63 (1974) (PER CURIAM).

Accord United States ex rel. Johnson v. Johnson, 531 F.2d 169, 173 (3rd Cir. 1976).

In the case before this Court it is clear that this ground was raised in the P.C.H.A. petition. Likewise the ground was raised in relator's brief submitted by counsel to the State Supreme Court under Argument Number 9 when it was stated "Appellant was denied effective assistance of counsel by reason of failure to object to the introduction of evidence in violation of your Appellant's constitutional right to silence and to counsel." Again in the "statement of questions presented" appellant's brief before the Supreme Court of Pennsylvania reads as follows:

> "IX. WAS APPELLANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY REASON OF FAILURE TO OBJECT TO THE INTRODUCTION OF EVIDENCE IN VIOLATION OF YOUR APPELLANT'S CONSTITUTIONAL RIGHT TO SILENCE AND TO COUNSEL (not answered by the Post-Conviction Court)."

The argument presented before this Court on federal habeas corpus is clearly the same. Here relator argues that he was denied effective assistance of counsel where counsel failed to object to testimonial reference by a police detective (to) your petitioner's right to remain silent and his right to refuse to answer questions without the assistance of counsel.

It is thus very clear that relator did give the state system the opportunity to resolve the federal constitutional issue and that not every detail need have been put before the state court in order to present all facets of the argument to

the federal court on the petition for habeas as here. I therefore will consider this argument on its merits.

At relator's trial, a police officer testified without objection that after relator stated that he was not in the Union Hall at the time of the homicides, relator advised the officer that he would answer no further questions until he had contacted an attorney. (N.T. Trial 469-470 supra).

It is the relator's contention that counsel in failing to object to the questions and answers given by Sgt. Hueston constituted an attorney's ignorance of relevant case law and therby rendered his assistance ineffective.

It is of course settled that references to an accused's exercise of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) are an impermissible subject for prosecutorial comment or testimony. Griffin v. California, 380 U.S. 609 (1965); Baker v. United States, 357 F.2d 11 (1966); United States v. Kroslack, 426 F.2d 1129 (7th Cir. 1970). This relator had a constitutional right to refuse to make a statement until his request that a lawyer be present was met. Miranda v. Arizona, supra. Therefore, I would find little difference between the prejudice resulting from the testimony admitted in the case before us, and a prosecutor's comment before a jury on a defendant's exercise of his constitutional right not to take the witness stand. Such comments have been held to be reversible error. Griffin v. California, supra. The testimony elicited here could well have led the jury to infer guilt from relator's refusal

TO MAKE A STATEMENT. I THINK THE EXERCISE OF A CONSTITUTIONAL PRIVILEGE SHOULD NOT INCUR THIS PENALTY. THE FIFTH CIRCUIT HAS STATED: "WE WOULD BE NAIVE IF WE FAILED TO RECOGNIZE THAT MOST LAYMEN VIEW AN ASSERTION OF THE FIFTH AMENDMENT PRIVILEGE AS A BADGE OF GUILT." WALKER V. UNITED STATES, 404 F.2D 900 (1968).

THE COMMONWEALTH ARGUES THAT THERE WAS NO TESTIMONY OR COMMENT CONCERNING THE IMPLICATIONS OF THE REQUEST. THEY FURTHER STATE THAT THE TESTIMONY WAS AN ISOLATED EPISODE IN A LENGTHY TRIAL AND THAT AN OBJECTION MAY HAVE ONLY HIGHLIGHTED RELATOR'S REQUEST FOR AN ATTORNEY. HERE, HOWEVER, AS DISTINGUISHED FROM UNITED STATES V. BECERA-SOTO, 387 F.2D 792 (7TH CIR. 1967), CERT DENIED 391 U.S. 928, NO CAUTIONARY INSTRUCTION WAS GIVEN WHEN SGT. HUESTON DISCUSSED RELATOR'S SILENCE. AND, THE VIOLATION OF RELATOR'S CONSTITUTIONAL RIGHTS IS OF GREATER SIGNIFICANCE IN VIEW OF THE THINNESS OF THE EVIDENCE AGAINST HIM IN THIS RECORD. SEE CHAPMAN V. CALIFORNIA, 386 U.S. 18.

THUS, WE COME TO THE QUESTION OF WHETHER OR NOT THE FAILURE TO OBJECT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL IN THIS INSTANCE. IN DETERMINING THIS ISSUE WE ARE FACED IMMEDIATELY WITH THE RECENT DECISION OF THE SUPREME COURT OF THE UNITED STATES IN WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA V. SYKES, ___ U.S. ___, DECIDED JUNE 23, 1977, NUMBER 75-1578. THIS DECISION HELD THAT THE DEFENDANT'S FAILURE TO MAKE A TIMELY OBJECTION UNDER THE FLORIDA CONTEMPORANEOUS OBJECTION RULE TO THE ADMISSION OF INCULPATORY STATEMENTS, ABSENT

A SHOWING OF CAUSE FOR THE NONCOMPLIANCE AND SOME SHOWING OF ACTUAL PREJUDICE, BARRED FEDERAL HABEAS CORPUS REVIEW OF HIS MIRANDA CLAIM. THE DECISION IS CRITICAL BECAUSE OF THE OVERRULING OF THE LEADING CASE OF FAY V. NOIA, 372 U.S. 391 (1963). WAINWRIGHT HELD THAT THE SWEEPING LANGUAGE SET FORTH IN FAY V. NOIA, WHICH WOULD RENDER A STATE'S TIMELY-OBJECTION RULE INEFFECTIVE TO BAR REVIEW OF UNDERLYING FEDERAL CLAIMS IN FEDERAL HABEAS CORPUS PROCEEDINGS-ABSENT A "KNOWING WAIVER" OR A "DELIBERATE BYPASS" OF THE RIGHT TO SO OBJECT, WAS REJECTED AS ACCORDING TOO LITTLE RESPECT TO THE STATE TIMELY OBJECTION RULE. CONVERSELY, THE RULE OF FAY V. NOIA, MAY ENCOURAGE DEFENSE LAWYERS TO TAKE THEIR CHANCES ON A VERDICT OF NOT GUILTY IN A STATE TRIAL COURT, INTENDING TO RAISE THEIR CONSTITUTIONAL CLAIMS IN A FEDERAL HABEAS CORPUS COURT IF THEIR INITIAL GAMBLE FAILS, AND DETRACTS FROM THE PERCEPTION OF THE TRIAL OF A CRIMINAL CASE AS A DECISIVE AND PORTENTOUS EVENT. THE COURT STATED AT PAGE 17:

> "....UNDER THE RULE OF FAY V. NOIA, SUPRA, STATE APPELLATE COURTS KNOW THAT A FEDERAL CONSTITUTIONAL ISSUE RAISED FOR THE FIRST TIME IN THE PROCEEDING BEFORE THEM MAY WELL BE DECIDED IN ANY EVENT BY A FEDERAL HABEAS TRIBUNAL. THUS THEIR CHOICE IS BETWEEN ADDRESSING THE ISSUE NOTWITHSTANDING THE PETITIONER'S FAILURE TO TIMELY OBJECT, OR ELSE FACE THE PROSPECT THAT THE FEDERAL HABEAS COURT WILL DECIDE THE QUESTION WITHOUT THE BENEFIT OF THEIR VIEWS.
>
> THE FAILURE OF THE FEDERAL HABEAS COURTS GENERALLY TO REQUIRE COMPLIANCE WITH A CONTEMPORANEOUS OBJECTION RULE TENDS TO DETRACT FROM THE PERCEPTION OF THE TRIAL OF A CRIMINAL CASE IN STATE COURT AS A DECISIVE AND PORTENTOUS EVENT. A DEFENDANT HAS BEEN ACCUSED OF A SERIOUS

> CRIME, AND THIS IS THE TIME AND PLACE SET FOR HIM TO BE TRIED BY A JURY OF HIS PEERS AND FOUND EITHER GUILTY OR NOT GUILTY BY THAT JURY. TO THE GREATEST EXTENT POSSIBLE ALL ISSUES WHICH BEAR ON THIS CHARGE SHOULD BE DETERMINED IN THIS PROCEEDING: THE ACCUSED IS IN THE COURTROOM, THE JURY IS IN THE BOX, THE JUDGE IS ON THE BENCH, AND THE WITNESSES, HAVING BEEN SUBPOENAED AND DULY SWORN, AWAIT THEIR TURNS TO TESTIFY. SOCIETY'S RESOURCES HAVE BEEN CONCENTRATED AT THAT TIME AND PLACE IN ORDER TO DECIDE, WITHIN THE LIMITS OF HUMAN FALLIBILITY, THE QUESTION OF GUILT OR INNOCENCE OF ONE OF ITS CITIZENS. ANY PROCEDURAL RULE WHICH ENCOURAGES THE RESULT THAT THOSE PROCEEDINGS BE AS FREE OF ERROR AS POSSIBLE IS THOROUGHLY DESIRABLE, AND THE CONTEMPORANEOUS OBJECTION RULE SURELY FALLS WITHIN THIS CLASSIFICATION."

AS IN WAINWRIGHT, RELATOR HAS ADVANCED NO EXPLANATION WHATEVER FOR HIS COUNSEL'S FAILURE TO OBJECT AT TRIAL TO THE TESTIMONY BROUGHT OUT BY THE PROSECUTOR.

THE TOUCHSTONE OF FAY V. NOIA, IS THE EXERCISE OF VOLITION BY THE DEFENDANT HIMSELF WITH RESPECT TO HIS OWN FEDERAL CONSTITUTIONAL RIGHTS. IN CONTRAST, THE CLAIM IN THE CASE BEFORE US RELATES TO EVENTS DURING THE TRIAL ITSELF. TYPICALLY, HABEAS PETITIONERS CLAIM THAT UNLAWFULLY SECURED EVIDENCE WAS ADMITTED AND THAT IMPROPER TESTIMONY WAS ADDUCED OR THAT AN IMPROPER JURY CHARGE WAS GIVEN. BUT UNLIKE FAY, PRESERVATION OF THIS TYPE OF CLAIM UNDER STATE PROCEDURAL RULES DOES NOT GENERALLY INVOLVE AN ASSERTION BY THE DEFENDANT HIMSELF; RATHER THE DECISION TO ASSERT OR NOT TO ASSERT CONSTITUTIONAL RIGHTS OR CONSTITUTIONALLY BASED OBJECTIONS AT TRIAL IS NECESSARILY ENTRUSTED TO THE DEFENDANT'S ATTORNEY, WHO MUST MAKE ON-THE-SPOT DECISIONS AT

VIRTUALLY ALL STAGES OF A CRIMINAL TRIAL. AS A PRACTICAL MATTER, A CRIMINAL DEFENDANT IS RARELY, IF EVER, IN A POSITION TO DECIDE, FOR EXAMPLE WHETHER CERTAIN TESTIMONY IS HEARSAY AND, IF SO, WHETHER IT IMPLICATES INTERESTS PROTECTED BY THE CONFRONTATION CLAUSE; INDEED IT IS BECAUSE "EVEN THE INTELLIGENT AND EDUCATED LAYMAN HAS SMALL AND SOMETIMES NO SKILL IN THE SCIENCE OF LAW" THAT THE SUPREME COURT HELD THAT CONSTITUTIONALLY (SIC) REQUIRED THAT EVERY DEFENDANT WHO FACES THE POSSIBILITY OF INCARCERATION BE AFFORDED COUNSEL. ARGERSINGER V. HAMLIN, 407 U.S. 25 (1972).

ONCE COUNSEL IS APPOINTED, THE DAY-TO-DAY CONDUCT OF THE DEFENSE RESTS WITH THE ATTORNEY. HE, NOT THE CLIENT, HAS THE IMMEDIATE-AND ULTIMATE-RESPONSIBILITY OF DECIDING IF AND WHEN TO OBJECT, WHICH WITNESSES, IF ANY, TO CALL, AND WHAT DEFENSES TO DEVELOP. NOT ONLY DO THESE DECISIONS REST WITH THE ATTORNEY, BUT SUCH DECISIONS MUST, AS A PRACTICAL MATTER, BE MADE WITHOUT CONSULTING THE CLIENT.[6]

THE TRIAL PROCESS DOES NOT PERMIT THE TYPE OF FREQUENT AND PROTRACTED INTERRUPTIONS WHICH WOULD BE NECESSARY IF IT WERE REQUIRED THAT CLIENTS GIVE KNOWING AND INTELLIGENT APPROVAL TO EACH OF THE MYRIAD TACTICAL DECISIONS AS THE TRIAL PROCEEDS.

SINCE TRIAL DECISIONS ARE OF NECESSITY ENTRUSTED TO THE ACCUSED'S ATTORNEY, THE FAY STANDARD OF "KNOWING AND INTELLIGENT WAIVER" IS SIMPLY INAPPLICABLE. MOREOVER, WHILE THE TESTIMONY

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[6] ONLY SUCH BASIC DECISIONS AS TO WHETHER TO PLEAD GUILTY, WAIVE A JURY, OR TESTIFY ON ONE'S OWN BEHALF ARE ULTIMATELY FOR THE ACCUSED TO MAKE. SEE ABA REPORT ON STANDARDS RELATING TO THE PROSECUTION FUNCTION AND DEFENSE FUNCTION §5.2 AT 237-238.

IN QUESTION IS NOW CLEARLY IMPROPER UNDER THE PENNSYLVANIA CASE OF COMMONWEALTH V. HAIDEMAN, 449 PA. 367 (1972), HAIDEMAN WAS NOT DECIDED UNTIL SOME FIVE YEARS AFTER RELATOR'S TRIAL AND WAS THE FIRST PENNSYLVANIA DECISION TO HOLD THIS TYPE OF TESTIMONY INADMISSIBLE.

I RECOMMEND TO THIS COURT THAT ON THIS ISSUE A FINDING BE MADE THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE TESTIMONY REFERRING TO RELATOR'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS.

IV.

THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO PRESERVE OBJECTION TO THE OFFERING OF A SECRET MEMORANDUM TO THE TRIAL JUDGE.

ON THE DATE JURY SELECTION WAS SCHEDULED TO COMMENCE IN THE TRIAL OF THE RELATOR, THE ASSISTANT DISTRICT ATTORNEY REQUESTED A CONTINUANCE OF THE CASE AND INDICATED FOR THE RECORD THAT HE DECLINED TO DISCLOSE THE REASON. (N.T. TRIAL MAY 17, 1967, P. 35, 48). OVER THE DEFENSE OBJECTION, THE REASON FOR THE REQUEST FOR CONTINUANCE WAS PLACED IN A SEALED ENVELOPE AND DELIVERED TO THE TRIAL JUDGE. THE TRIAL NOTES OF TESTIMONY REFLECT THE FACT THAT THE CONTENTS OF THAT ENVELOPE WERE NEVER DISCLOSED TO DEFENSE COUNSEL, AND TRIAL COUNSEL, JUDGE DIBONA, TESTIFIED AT THE POST-CONVICTION PROCEEDINGS THAT HE NEVER LEARNED THE CONTENTS OF THAT ENVELOPE. (N.T. POST-CONVICTION P. 70). HE STATED FURTHER THAT HE HAD NO IDEA WHETHER THE COMMUNICATION BETWEEN THE ASSISTANT

DISTRICT ATTORNEY AND THE TRIAL JUDGE HAD ANYTHING TO DO WITH TRIAL EVIDENCE IN THE CASE, AND HE CHARACTERIZED THE SITUATION IN WHICH HE FOUND HIMSELF AS "OPPOSED TO EVERY CONCEPT OF JUSTICE, EVERY CONCEPT OF ETHICS, EVERY CONCEPT OF PROPRIETY FOR A PARTY AND LITIGANT TO HAVE A COMMUNICATION WITH THE JUDGE TO THE EXCLUSION OF THE OTHER SIDE, AND HAVE AN IRONCLAD RULE THAT THE OTHER SIDE MAY NOT KNOW ABOUT." (N.T. POST-CONVICTION P. 47). IT IS CONTENDED THAT NEITHER JUDGE DIBONA NOR MR. PERUTO EVER RAISED THIS ISSUE IN POST-TRIAL MOTIONS AND THAT NO BRIEF WAS EVER FILED ON RELATOR'S BEHALF ON APPEAL. THE TRIAL JUDGE HIMSELF TESTIFIED IN POST-CONVICTION PROCEEDINGS AT THE REQUEST OF THE ASSISTANT DISTRICT ATTORNEY RELATING TO THE COMMONWEALTH'S HAVING COME INTO RECENT POSSESSION OF WEAPONS WHICH IT WISHED TO HAVE TESTED PRIOR TO COMMENCEMENT OF TRIAL. (N.T. 12-14; 53-56). RELATOR ARGUES THAT WHATEVER MAY HAVE BEEN THE SUBSTANCE OF THE COMMONWEALTH'S EVIDENCE, WHETHER FAVORABLE OR UNFAVORABLE TO THE DEFENSE, THE CONDUCT OF THE ASSISTANT DISTRICT ATTORNEY IN THE TRIAL COURT WITH RESPECT TO THE RECEPTION OF A PRIVATE COMMUNICATION, MANY YEARS LATER FOUND TO HAVE RELATED TO WEAPONS SHOULD HAVE BEEN DISCLOSED TO THE RELATOR'S COUNSEL AND THE POSITION WITH RESPECT TO THIS MOTION SHOULD HAVE BEEN PRESERVED FOR POST-TRIAL MOTIONS AND SHOULD HAVE BEEN APPEALED. RELATOR FURTHER ARGUES THAT THE CONSEQUENCE OF THE CONDUCT WAS LEFT WITH THE SPECULATION THAT THE BALLISTICS EXPERT IN FACT HAD SOME WEAPONS, EXAMINED SOME, AND PREPARED REPORTS WITH RESPECT TO THEM, WHEREAS THE DEFENSE HAD

NO OPPORTUNITY TO AVAIL ITSELF EITHER OF NEGATIVE OR POSITION (SIC) INFERENCES THEREFROM. NOW RELATOR RELIES ON BRADY V. MARYLAND, 373 U.S. 83, AND ARGUES THAT THE SUPPRESSION OF THIS MATERIAL VIOLATED HIS DUE PROCESS RIGHTS.

AT TRIAL, THE BALLISTICS EXPERT TESTIFIED THAT HE HAD TEST FIRED CERTAIN GUNS DURING HIS INVESTIGATION AND FOUND THAT THESE WEAPONS WERE NOT USED TO COMMIT THE CRIMES HEREIN INVOLVED. THUS, NOT ONLY WAS THE OBJECTION NOT ADDRESSED TO THE PROPRIETY OF THE TRIAL COURT'S RULING PERMITTING THE WITNESS TO EXAMINE THE WEAPONS, BUT THE ACTUAL RESULTS WERE NOT HARMFUL TO THE DEFENSE.

THE THRUST OF THE OBJECTION WAS DIRECTED TO A PRIVATE COMMUNICATION BETWEEN THE COURT AND PROSECUTION IN WHICH THE DEFENSE WAS EXCLUDED. WHILE THE SUPREME COURT OF PENNSYLVANIA FOUND THAT SUCH A PRACTICE SHOULD NOT BE CONDONED, IT DID NOT FIND THAT ANY PREJUDICE TO RELATOR RESULTED IN THIS CASE. THE COURT THUS FOUND THAT IF COUNSEL HAD PRESSED THIS OBJECTION ON APPEAL IT WOULD NOT HAVE JUSTIFIED THE AWARD OF A NEW TRIAL. THUS, COUNSEL COULD NOT BE FOUND TO BE INEFFECTIVE FOR FAILING TO PRESERVE AN OBJECTION WHICH HAD NO PROBABILITY TO SUCCESS (SIC). MOREOVER, THE CONTENTION THAT THE FAILURE OF THE COMMONWEALTH TO MAKE AVAILABLE TO THE DEFENSE THESE REPORTS IN any WAY VIOLATED RELATOR'S DUE PROCESS RIGHTS UNDER BRADY V. MARYLAND, SUPRA, IS UNWARRANTED. BRADY, SUPRA, REQUIRES THE

PROSECUTION TO FURNISH THE DEFENSE EVIDENCE ON DEMAND WHICH WOULD TEND TO EXCULPATE HIM OR REDUCE THE DEGREE OF PENALTY. AS INDICATED ABOVE, THE INFORMATION WAS INTRODUCED DURING THE TRIAL AND THE DEFENSE HAD THE OPPORTUNITY OF USING IT IN ANY MANNER IT DEEMED APPROPRIATE.

IN UNITED STATES V. AGURS, 427 U.S. 97 (1976) THE SUPREME COURT CONSIDERED WHETHER THE PROSECUTOR HAD ANY CONSTITUTIONAL DUTY TO VOLUNTEER EXCULPATORY MATTER TO THE DEFENSE, AND IF SO, WHAT STANDARD OF MATERIALITY GAVE RISE TO THAT DUTY. THE COURT HELD THAT THE PROSECUTOR WILL NOT HAVE VIOLATED HIS CONSTITUTIONAL DUTY OF DISCLOSURE UNLESS HIS ADMISSION IS OF SUFFICIENT SIGNIFICANCE TO RESULT IN THE DENIAL OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL. THE COURT NOTED AT PAGE 109:

> "....THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE PROSECUTION MAKE A COMPLETE AND DETAILED ACCOUNTING TO THE DEFENSE OF ALL POLICE INVESTIGATORY WORK ON THE CASE." MOORE V. ILLINOIS, 408 U.S. 786, 795. (EMPHASIS ADDED.)

THE MERE POSSIBILITY THAT AN ITEM OF UNDISCLOSED INFORMATION MIGHT HAVE HELPED THE DEFENSE, OR MIGHT HAVE AFFECTED THE OUTCOME OF THE TRIAL, DOES NOT ESTABLISH "MATERIALITY" IN THE CONSTITUTIONAL SENSE.

THE CONSTITUTIONAL OBLIGATION IS MEASURED NOT BY THE MORAL CULPABILITY OR THE WILFULNESS OF THE PROSECUTOR. IF EVIDENCE HIGHLY PROBATIVE OF INNOCENCE IS IN HIS FILE, HE SHOULD BE PRESUMED TO RECOGNIZE ITS SIGNIFICANCE EVEN IF HE HAS ACTUALLY OVERLOOKED IT. CF. GIGLIO V. UNITED STATES, 405 U.S. 150, 154.

CONVERSELY, IF EVIDENCE HAS NO PROBATIVE SIGNIFICANCE AT ALL, NO PURPOSE WOULD BE SERVED BY REQUIRING A NEW TRIAL SIMPLY BECAUSE AN INEPT PROSECUTOR INCORRECTLY BELIEVED HE WAS SUPPRESSING A FACT THAT WOULD BE VITAL TO THE DEFENSE. IF THE SUPPRESSION OF EVIDENCE RESULTS IN CONSTITUTIONAL ERROR, IT IS BECAUSE OF THE CHARACTER OF THE EVIDENCE, NOT THE CHARACTER OF THE PROSECUTOR. IT NECESSARILY FOLLOWS THAT IF THE OMITTED EVIDENCE CREATES A REASONABLE DOUBT THAT DID NOT OTHERWISE EXIST, CONSTITUTIONAL ERROR HAS BEEN COMMITTED. THIS MEANS THAT THE ADMISSION MUST BE EVALUATED IN THE CONTEXT OF THE ENTIRE RECORD. IF THERE IS NO REASONABLE DOUBT ABOUT GUILT WHETHER OR NOT THE ADDITIONAL EVIDENCE IS CONSIDERED, THERE IS NO JUSTIFICATION FOR A NEW TRIAL. IT IS THEREFORE CLEAR THAT NO CONSTITUTIONAL ERROR HAS BEEN COMMITTED IN THIS CASE BECAUSE THE ACTUAL RESULTS OF THE TESTS ON THE WEAPONS WERE NOT HARMFUL TO THE DEFENSE AND WOULD NOT HAVE CREATED A REASONABLE DOUBT EVEN IF THE EVIDENCE WERE DISCLOSED TO THE DEFENSE BEFORE THE TRIAL.

IT IS ALSO CLAIMED THAT TRIAL COUNSEL'S FAILURE TO PRESERVE AN OBJECTION TO THE TRIAL COURT'S DENIAL OF A REQUEST FOR ADDITIONAL ALLEGED BRADY MATERIAL CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL. SPECIFICALLY RELATOR CONTENDS THAT THE PROSECUTION'S CHIEF WITNESS, ONE FRANCIS MCGRATH, HAD MADE VARIOUS CONTRADICTORY STATEMENTS TO ONE DETECTIVE MCGILL DURING THE COURSE OF AN INTERVIEW AT POLICE HEADQUARTERS. IT IS RELATOR'S POSITION THAT HE WAS PREVENTED FROM LEARNING OF THIS

INFORMATION UNTIL AFTER THE CLOSE OF THE TRIAL AND THEREFORE PRECLUDED FROM SUBPOENING (SIC) THE DETECTIVE AS A DEFENSE WITNESS. THERE IS HOWEVER, NO FACTUAL BASIS FOR THIS ASSERTION. ON THE CONTRARY, THE STATE COURT RECORD ESTABLISHES THAT DEFENSE COUNSEL LEARNED OF THE INTERVIEW WITH MCGILL DURING HIS CROSS-EXAMINATION OF MCGRATH.

> "QUESTION: YOU WERE THERE ON SUNDAY, RATHER, JUNE 19, IS THAT RIGHT?
>
> ANSWER: THAT IS RIGHT.
>
> QUESTION: AND THAT IS THE TIME YOU TALKED TO DETECTIVE DUFFY, IS THAT RIGHT?
>
> ANSWER: DUFFY.
>
> QUESTION: THEN YOU WENT BACK ON JUNE 21ST, THE MONDAY, IS THAT RIGHT SIR...I AM SORRY, THE 20TH?
>
> ANSWER: THE 20TH, THAT IS RIGHT.
>
> QUESTION: WHO DID YOU TALK TO THEN, BY THE WAY?
>
> ANSWER: I TALKED TO DETECTIVE MCGILL, DETECTIVE BROOKS. I TALKED TO MCGOWEN. I TALKED TO LT. MATTHIS, THAT IS ABOUT ALL I CAN REMEMBER, WHO I TALKED TO."

DESPITE THE INFORMATION ILLICITED (SIC) FROM THIS WITNESS, DEFENSE COUNSEL NEVER ATTEMPTED TO SUBPOENA MCGILL AS A WITNESS NOR DID THEY REQUEST ANY NOTES THAT MIGHT HAVE BEEN TAKEN BY MCGILL OF HIS CONVERSATIONS WITH MCGRATH. ALTHOUGH BRADY REQUIRES THE PROSECUTION TO PROVIDE THE DEFENSE UPON REQUEST WITH MATERIAL IN ITS POSSESSION WHICH WOULD BE BENEFICIAL TO THE DEFENDANT, THE RECORD HERE REFLECTS THAT THERE WAS NO REQUEST FOR SUCH INFORMATION.

HENCE, THERE WAS NO BRADY VIOLATION FOR TRIAL COUNSEL TO PRESERVE. NOR, DO I BELIEVE THAT THE FAILURE TO INTRODUCE THESE ALLEGED INCONSISTENT STATEMENTS FROM THE INTERVIEW CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL. THE STATEMENTS RELATED ONLY TO THE QUESTION OF CARCHIDI'S GUILT OR INNOCENCE. THERE IS, HOWEVER, NO ASSERTION THAT THESE STATEMENTS HAD ANY DIRECT BEARING UPON THE INNOCENCE OF THIS RELATOR. THUS, THE ONLY PURPOSE TO BE SERVED BY THE INTRODUCTION OF THE REMARKS WOULD HAVE BEEN TO IMPEACH MCGRATH'S CREDIBILITY AS A WITNESS IN THE EYES OF THE JURY. THE EXTENT TO WHICH DEFENSE COUNSEL CHOOSES TO PURSUE A COLLATERAL ISSUE IS CLEARLY A MATTER OF JUDGMENT. UPON REVIEW OF THE STATE COURT RECORD I AM SATISFIED THAT THE DEFENSE EXPLORED THE ISSUE AS WELL AS HE DEEMED POSSIBLE. DURING THE COURSE OF THE TRIAL, MCGRATH WAS SKILLFULLY CROSS-EXAMINED BY EXPERIENCED COUNSEL CONCERNING VARIOUS INCONSISTENT REMARKS MADE TO THE POLICE, AT THE MEDICAL EXAMINER'S INQUEST AND TO OTHER INDIVIDUALS. THESE VARIATIONS WERE STRENUOUSLY ARGUED TO THE JURY AS AN ATTACK UPON THE WITNESSES' (SIC) CREDIBILITY. HAVING ATTEMPTED TO IMPEACH THE CREDIBILITY OF THE WITNESS, I BELIEVE THAT COUNSEL'S STEWARDSHIP WAS NOT INEFFECTIVE MERELY BECAUSE HE DID NOT EXPOSE EVERY ARGUABLE INCONSISTENCY IN MCGRATH'S TESTIMONY.

VI.
CONFLICT OF INTEREST

SULLIVAN ALLEGES THAT HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AMENDMENT, BECAUSE HIS REPRESENTATION WAS MADE BY TWO

ATTORNEYS WHO WERE BURDENED BY A CONFLICT OF INTEREST BY REASON OF THEIR SIMULTANEOUS REPRESENTATION OF RELATOR'S TWO CO-DEFENDANTS, GREGORY CARCHIDI AND ANTHONY DIPASQUALE. THE COMMONWEALTH, ON THE OTHER HAND, CONTENDS THAT SUCH REPRESENTATION WAS EFFECTIVE, STATING THAT COUNSEL WAS COMPETENT AND THAT HIS ACTIONS HAD A REASONABLE BASIS DESIGNED TO EFFECTUATE RELATOR'S INTERESTS.[7]

RELATOR ADDITIONALLY ASSERTS THAT DEFENSE COUNSELS' DECISION NOT TO PERMIT HIM TO TESTIFY ON HIS OWN BEHALF AND TO PRESENT NO EVIDENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL, IN THAT SUCH DECISIONS WERE NOT BASED ON THE UNDIVIDED ASSESSMENT OF HIS BEST INTEREST, BUT RATHER ON THE CONSIDERATION BY COUNSEL NOT TO REVEAL THE DEFENSE STRATEGY TO BE USED IN THE TRIALS OF HIS CO-DEFENDANTS, WHICH WERE SET AT A LATER DATE. ON THIS ISSUE, THE COMMONWEALTH CONTENDS THAT THE ONLY INTERESTS CONSIDERED AT THE TIME OF SULLIVAN'S TRIAL WERE THOSE OF RELATOR HIMSELF.

SINCE 1942, THE UNITED STATES SUPREME COURT HAS RECOGNIZED THAT A DEFENDANT IS "ENTITLED TO THE UNTRAMMELED AND UNIMPAIRED ASSISTANCE OF COUNSEL FOR HIS DEFENSE." GLASER V. UNITED STATES, 315 U.S. 60, 70 (1942); UNITED STATES V. GEORGE RIPSO, 470 F.2D 1099, 1102 (3RD CIR. 1973); GOVERNMENT OF THE VIRGIN ISLANDS V. JOHN, 447 F.2D 69, 74 (3RD CIR. 1971); WALKER V. UNITED STATES, 422 F.2D 374, 375 (3RD CIR.) CERT DENIED, 399 U.S. 915

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[7] ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS, PAGE 9, AND APPELLEE'S BRIEF, PAGE 39. IT SHOULD INITIALLY BE NOTED THAT RESPONDENT IS REFERRING TO COUNSEL IN THE SINGULAR FORM, SEE FOR EXAMPLE I.D., AT VI A. (ESPECIALLY THE PHRASE "COUNSEL'S ADVICE"), WHEREAS RELATOR USES COUNSEL IN THE PLURAL MEANING OF THE TERM.

(1970). "THE RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS CONTEMPLATES THE SERVICE OF ANY ATTORNEY DEVOTED SOLELY TO THE INTERESTS OF HIS CLIENT." UNITED STATES EX REL. HART V. DAVENPORT, 478 F.2D 203, 209 (3RD CIR. 1973) (EMPHASIS ADDED.) WHERE COUNSEL IS FOUND TO BE INEFFECTIVE, THE VERDICT MUST BE SET ASIDE AND A NEW TRIAL GRANTED. GLASER V. UNITED STATES, SUPRA. AT 76. THIS RIGHT TO UNIMPAIRED ASSISTANCE APPLIES BOTH BEFORE TRIAL, IN CONSIDERING HOW TO PLEAD, AS WELL AS DURING THE TRIAL ITSELF. UNITED STATES EX REL. HART V. DAVENPORT, SUPRA. AT 209. THE RIGHT TO COUNSEL "REQUIRES NOTHING LESS THAN THE UNDIVIDED LOYALTY OF COUNSEL IN BEHALF OF HIS CLIENT." UNITED STATES EX REL. PLATTS V. MYERS, 253 F. SUPP 23, 25 (E.D. PA. 1966). NO ONE CONTENDS HERE THAT RELATOR INTELLIGENTLY, KNOWINGLY, AND COMPETENTLY WAIVED HIS CONSTITUTIONAL RIGHT TO COUNSEL AS NECESSARY UNDER JOHNSON V. ZERBST, 304 U.S. 458 (1938) AND UNITED STATES EX REL. HART V. DAVENPORT, SUPRA. AT 211.

IT IS BY UTILIZATION OF THIS BACKGROUND THAT WE MUST DECIDE WHETHER THERE WAS DUAL REPRESENTATION, AND IF SO, WHETHER A POSSIBILITY OF CONFLICT IN SUCH REPRESENTATION WAS EVIDENCED.

ON THE ISSUE OF DUAL REPRESENTATION, THE SUPREME COURT OF PENNSYLVANIA, IN COMMONWEALTH V. SULLIVAN, 371 A.2D 468, HELD THAT:

> "THE TESTIMONY ESTABLISHES THAT THERE WAS NO DUAL REPRESENTATION IN THE TRUE SENSE OF THE TERM, I.E., THE SAME COUNSEL ACTIVELY REPRESENTED CO-DEFENDANTS. MR. PERUTO TESTIFIED THAT IT WAS MR. (NOW JUDGE) DIBONA WHO SERVED AS CHIEF COUNSEL FOR APPELLANT DURING TRIAL AND MADE ALL DECISIONS RELEVANT TO SULLIVAN'S DEFENSE, WHILE HE, MR. PERUTO, WAS MERELY ASSISTING. THESE FUNCTIONS WERE REVERSED AT THE TRIAL OF THE CO-DEFENDANTS WHERE MR. PERUTO WAS CHIEF COUNSEL AND JUDGE DIBONA THE ASSISTANT. THUS, JUDGE DIBONA SERVED ONLY A MINOR ROLE IN THE TRIAL OF THE CO-DEFENDANTS WHILE DEVOTING HIS PRIMARY EFFORTS TO THE SULLIVAN CASE. THIS CONCLUSION IS SUPPORTED BY JUDGE DIBONA'S STATEMENTS THAT HIS STEWARDSHIP WAS IN NO WAY AFFECTED BY HIS CONSIDERATION OF THE CO-DEFENDANT'S (SIC) CASES BUT WAS SOLELY A PRODUCT OF WHAT HE CONSIDERED TO BE THE BEST COURSE IN HIS REPRESENTATION OF SULLIVAN. WE THEREFORE HOLD THAT THERE IS ABSOLUTELY NO EVIDENCE THAT A CONFLICT EXISTED. 371 A.2D AT 486. (EMPHASIS ADDED.)

THE SUPREME COURT BASED ITS DECISION ON THIS CRITICAL ISSUE UPON THE TESTIMONY OF MR. PERUTO, AT LEAST IN GREAT PART, AND THE COMMONWEALTH USES THIS FINDING IN SUPPORT OF ITS ARGUMENT THAT THERE WAS NO DUAL REPRESENTATION. ON THE OTHER HAND, THE COMMONWEALTH HAS VEHEMENTLY REQUESTED THAT WE DO NOT BELIEVE ANYTHING THAT MR. PERUTO SAYS.

> "IN FACT, A REVIEW OF THE WHOLE RECORD SHOWS THAT LITTLE OF MR. PERUTO'S TESTIMONY IS WORTHY OF BELIEF...MR. PERUTO CONSISTENTLY SHOWED A TOTAL DISREGARD FOR THE TRUTH AND REPEATEDLY CONTRADICTED HIMSELF, OTHER WITNESSES AND THE RECORD."[8]

WE ARE THUS SQUARELY FACED WITH TWO DIVERGENT ARGUMENTS PUT FORTH BY THE COMMONWEALTH:

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[8] BRIEF OF APPELLEE AT 43 N. 11.

1. IGNORE MR. PERUTO'S TESTIMONY IN EVERY INSTANCE, BUT

2. ACCEPT THE STATEMENT ON WHICH THE PENNSYLVANIA SUPREME COURT BASED ITS CONCLUSION "THAT THERE IS ABSOLUTELY NO EVIDENCE THAT A CONFLICT EXISTED."

THERE IS SERIOUS DOUBT AS TO WHETHER THE SUPREME COURT REACHED THE CORRECT CONCLUSION ON THE ISSUE OF WHETHER THERE WAS DUAL REPRESENTATION. ALTHOUGH THERE IS SOME FACTUAL BASIS FOR THIS DECISION, IT AGAIN RESTS ON ONE OF MR. PERUTO'S STATEMENTS:

> "Q. (MR. MORAN): YOU ALSO REPRESENTED THE OTHER TWO DEFENDANTS DIPASQUALE AND CARCHIDI IN THIS CASE; IS THAT CORRECT, SIR?
>
> A. (MR. PERUTO): THE OTHER TWO I TRIED. I WAS TRIAL COUNSEL. MR. DIBONA WAS TRIAL COUNSEL FOR MR. SULLIVAN."
> (N.T. POST-CONVICTION, APRIL 25, 1974, P. 90.)

MR. PERUTO'S RECOLLECTION OF HOW THE DEFENDANTS CHOSE WHETHER HE OR JUDGE DIBONA WOULD REPRESENT THEM INDIVIDUALLY WAS BROUGHT OUT ON DIRECT EXAMINATION AT THE POST-CONVICTION HEARING:

> "ALTHOUGH IT APPEARS THAT I'M CO-COUNSEL IN THE CASE OF JOHN SULLIVAN, SUCH WAS NOT COMPLETELY THE CORRECT STATEMENT. THE THREE DEFENDANTS WERE TOGETHER IN THE CELL ROOM WHEN WE WERE READY TO GO TO TRIAL. AND THE THREE OF THEM WERE TOLD NOW THIS IS THE SITUATION, ONE OF US WILL BE PERMITTED TO DO THE CROSS-EXAMINATION AND THE SUMMATIONS AND THE ACTUAL HANDLING OF THE CASE. YOU'RE GOING TO HAVE TO CHOOSE BETWEEN US OR ANY OTHER LAWYER OF YOUR CHOICE. SULLIVAN INDICATED THE DESIRE THAT JUDGE DIBONA WAS OLDER AND MORE EXPERIENCED AND HE ELECTED TO HAVE JUDGE DIBONA TRY HIS CASE. THE OTHER TWO DEFENDANTS ELECTED TO HAVE ME TRY THEIR CASE. JUDGE DIBONA AND I THEN AGREED THAT WHICHEVER OF US WOULD BE SELECTED TO TRY THE CASE THE OTHER OF US WOULD ASSIST, BUT NOT IN THE SENSE OF BEING COEQUAL BUT MERELY TO ASSIST SUCH AS YOU KNOW, GET PAPERS READY OR SOMETHING LIKE THAT."
> (APRIL 25, 1974, P. 108-09.)

HOWEVER, BOTH MR. PERUTO AND JUDGE DIBONA ENTERED APPEARANCES FOR RELATOR AT HIS TRIAL, AND THERE WAS NO DESIGNATION ON THAT RECORD THAT ONE OF THEM WAS CHIEF COUNSEL AND THE OTHER HIS ASSISTANT. THERE IS NO DOUBT THAT BOTH ATTORNEYS WERE ACTIVE DURING THE COURSE OF RELATOR'S TRIAL. ALTHOUGH JUDGE DIBONA WAS THE MAJOR ONE OF THE PAIR WHO ARGUED TO THE JURY, THERE ARE NUMEROUS INSTANCES WHEN MR. PERUTO PRESENTED ARGUMENTS TO THE COURT.[9]

ON THE ADMISSIBILITY OF COMMONWEALTH'S EXHIBITS AT THE CLOSE OF ITS CASE, MR. PERUTO WAS OFTEN THE ONLY ONE DECIDING WHETHER OR NOT TO OBJECT,[10] AND HE ALONE MOVED FOR THE DIRECTED VERDICT OF ACQUITTAL.[11] PERHAPS, MOST SIGNIFICANT IS THE FACT THAT MR. PERUTO ALONE MADE THE ARGUMENT TO THE JURY ON WHETHER THE

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THESE CAN BE FOUND IN THE TRIAL RECORDS AT:

DATE:	PAGES IN RECORD:
1. MAY 17, 1967	48-57
2. JUNE 7, 1967	7-53, 74-76, 121-25, 149-57
3. JUNE 8, 1967	170, 173-175
4. JUNE 13, 1967	656-72, 658
5. JUNE 14, 1967	720-29, 808-09
6. JUNE 15, 1967	934-37, 1000-10, 1064-66, 1072-81
7. JUNE 16, 1967	1094-1131
8. JUNE 18, 1967	1139-40, 1228-30, 1247-67, 1278-80

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SEE FOR EXAMPLE PAGES 1074-1079.

11
N.T. TRIAL, JUNE 16, 1967, P. 1130.

SENTENCE IMPOSED SHOULD BE LIFE IMPRISONMENT OR DEATH.[12] MR. PERUTO PRESENTED ORAL ARGUMENT TO THE COURT ON NEARLY EVERY ISSUE THAT JUDGE DIBONA DID, WITH THE EXCEPTION OF THE ARGUMENT TO THE JURY ON THE SIGNIFICANT ISSUE OF WHAT SENTENCE WOULD BE IMPOSED, WHERE THE ARGUMENT WAS MADE SOLELY BY MR. PERUTO. ALTHOUGH MR. PERUTO TESTIFIED THAT HIS ROLE WAS NOT THAT OF A COEQUAL TO JUDGE DIBONA, BUT RATHER WAS LIMITED TO "GET(TING) PAPERS READY OR SOMETHING LIKE THAT", (N.T. POST-CONVICTION, APRIL 25, 1974, P. 109) THE AFOREMENTIONED PARTICIPATION STRONGLY REFUTES PERUTO'S RECOLLECTION ON THIS MATTER.

FURTHER, THERE IS OTHER TESTIMONY WHICH REFUTES THE STATE COURT'S CONCLUSION THAT THERE WAS NO DUAL REPRESENTATION BY MR. PERUTO AND JUDGE DIBONA WITH RESPECT TO THE THREE DEFENDANTS, SHOWING INSTEAD THAT JUDGE DIBONA ALONE WAS CHIEF COUNSEL FOR SULLIVAN, WHILE MR. PERUTO SERVED IN THE SAME ROLE FOR RELATOR'S CO-DEFENDANTS. FOR EXAMPLE, THE RECORD OF THE PRE-TRIAL CONFERENCES REVEALS THAT JUDGE DIBONA REPRESENTED CARCHIDI.[13] CONTRAST WITH THIS, MR. PERUTO'S STATEMENT: "I INSIST ON BEHALF OF MY OTHER CLIENT DIPASQUALE AND THE MAN THAT I NOW REPRESENT TOGETHER WITH JUDGE (SIC) DIBONA, MR. SULLIVAN..." (N.T. TRIAL, MAY 11, 1967, P. 3). EVEN JUDGE DOTY, IN HIS OPINION AFTER THE POST-CONVICTION HEARING, SAID: "A. CHARLES PERUTO, DEFENDANT'S CO-COUNSEL..." (NOVEMBER 6, 1974, AT P. 3.) (EMPHASIS ADDED.)

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[12] N.T. TRIAL, JUNE 19, 1967, P. 1247-1264.

[13] APPELLEE'S BRIEF, AT 43 N. 11. ADDITIONALLY, JUDGE DIBONA REFERRED TO GREGORY CARCHIDI AS HIS OTHER CLIENT IN THE BEGINNING OF THE TRIAL ITSELF. (N.T. TRIAL, MAY 11, 1967, P. 3.)

MOREOVER, ACCORDING TO MR. PERUTO, HE MADE THE DECISION THAT THE DEFENSE SHOULD NOT PRODUCE ANY EVIDENCE. CONSIDER THE FOLLOWING EXCHANGE ON DIRECT EXAMINATION:

> "Q. WAIT JUST A MINUTE, SIR. YOU WERE CONCERNED WITH THE OTHER TWO DEFENDANTS YOU REPRESENTED; IS THAT CORRECT?
>
> A. (BY MR. PERUTO). YES. WHY EXPOSE YOUR DEFENSE IF YOU HAVE GOT TWO MORE PEOPLE TO COME TO TRIAL AND THE COMMONWEALTH HAS NOT PRESENTED A CASE?
>
> Q. SO THAT ENTERED INTO YOUR CONSIDERATION AS TO WHETHER OR NOT YOU PRESENTED A DEFENSE IN THE SULLIVAN CASE?
>
> A. SURE, IT DID." (EMPHASIS ADDED.)

(N.T. POST-CONVICTION, APRIL 25, 1974, P. 101.)

FURTHER, AT TRIAL, MR. PERUTO STATED THAT "MR. DIBONA HAS ENTRUSTED THE DEFENSE TO ME AND THE DEFENSE RESTS." (EMPHASIS ADDED.) (N.T. TRIAL, JUNE 16, 1967, P. 1128.) HAD JUDGE DIBONA NOT SO ENTRUSTED THE DEFENSE, SURELY HE WOULD HAVE SAID SO AT THAT POINT. SEE ALSO MR. PERUTO'S DISCUSSION WITH SULLIVAN AS RECREATED BY RELATOR AT NOTES OF TESTIMONY POST-CONVICTION, MARCH 25, 1974, P. 156-60.

THE FACTS ESTABLISHED ON THE RECORD SHOW A PREPONDERANCE OF TESTIMONY WHICH LEADS ONE TO CONCLUDE THAT THE STATE COURT'S CONCLUSION IS NOT SUPPORTED BY CREDIBLE EVIDENCE. 28 U.S.C. §2254(D)(8) PROVIDES IN PART THAT IN HABEAS PROCEEDINGS, DETERMINATIONS OF FACTUAL ISSUES ARE PRESUMED CORRECT UNLESS THE FEDERAL COURT, CONSIDERING THE RECORD AS A WHOLE, CONCLUDES THAT SUCH FACTUAL DETERMINATION IS NOT FAIRLY SUPPORTED BY THE RECORD.

OUR INDIVIDUAL DETERMINATION "IS IN NO WAY FORECLOSED...BY THE FACT THAT THE STATE TRIAL JUDGE OR THE JURY MAY HAVE REACHED A DIFFERENT RESULT ON THIS ISSUE," HAYNES V. WASHINGTON, 373 U.S. 503, 515 (1963), BECAUSE AS A FEDERAL COURT, WE ARE UNDER A DUTY TO "MAKE AN INDEPENDENT EXAMINATION OF THE RECORD TO DETERMINE WHETHER THOSE (STATE COURT) CONCLUSIONS ARE SUPPORTED BY THE EVIDENCE." DODGE V. JOHNSON, 471 F.2D 1249, 1250 (6TH CIR.) CERT DENIED, 412 U.S. 931 (1973).

IN ADDITION TO THE STATE COURT'S FACTUAL CONCLUSION THAT THERE WAS NO DUAL REPRESENTATION, A LEGAL DETERMINATION THAT NO CONFLICT EXISTED WAS MADE BY THE COURT. YET,

> "ALTHOUGH THE DISTRICT JUDGE MAY WHERE THE STATE COURT HAS RELIABLY FOUND THE RELEVANT FACTS, DEFER TO THE STATE COURT'S FINDINGS OF FACT, HE MAY NOT DEFER TO HIS FINDINGS OF LAW. IT IS THE DISTRICT JUDGE'S DUTY TO APPLY FEDERAL LAW TO THE STATE COURT FACT FINDINGS INDEPENDENTLY. THE STATE CONCLUSIONS OF LAW MAY NOT BE GIVEN BINDING WEIGHT ON HABEAS." TOWNSEND V. SAIN, 372 U.S. 293, 312 (1963).

BECAUSE OF THE OVERWHELMING EVIDENCE, REFUTING THE SUPREME COURT'S FACTUAL CONCLUSION THAT MR. PERUTO WAS MERELY AN ASSISTANT AT SULLIVAN'S TRIAL, WE FIND THAT SUCH DETERMINATION IS NOT FAIRLY SUPPORTED BY THE RECORD AS A WHOLE, AND THE COURT'S LEGAL CONCLUSION THAT THERE WAS NO DUAL REPRESENTATION NEED NOT BE ACCEPTED BY US, UNDER THE GOVERNING STANDARDS OF TOWNSEND.

YET, DUAL REPRESENTATION OF CRIMINAL DEFENDANTS TRIED TOGETHER IS NOT NECESSARILY A DEPRIVATION OF THEIR SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL. UNITED STATES

EX REL. SMALL V. RUNDLE, 442 F.2D 235, 237 (3RD CIR. 1971); WALKER V. UNITED STATES, SUPRA. AT 375; UNITED STATES EX REL. SMITH V. STATE, 341 F. SUPP. 268, 271 (D.C. N.J. 1972); UNITED STATES EX REL. PARIS V. BRIERLEY, 315 F. SUPP. 1392, 1395 (W.D. PA. 1970). "WHETHER OR NOT ACTUAL PREJUDICE EXISTED, IT IS SUFFICIENT TO CONSTITUTE A VIOLATION OF THE RELATOR'S CONSTITUTIONAL RIGHTS IF THE LAWYER IS SERVING CONFLICTING INTERESTS." UNITED STATES EX REL. PLATTS V. MYERS, SUPRA AT 25. SEE ALSO UNITED STATES EX REL. MARTINAS V. BRIERLEY, 273 F. SUPP. 260, 261 (E.D. PA. 1967).

"THERE MUST BE A SHOWING OF POSSIBLE CONFLICT OF INTEREST OR PREJUDICE, HOWEVER REMOTE, BEFORE A REVIEWING COURT WILL FIND DUAL REPRESENTATION CONSTITUTIONALLY DEFECTIVE." UNITED STATES EX REL. HORTA V. DEYOUNG, 523 F.2D 807, 808-09 (3RD CIR. 1975); UNITED STATES EX REL. HART V. DAVENPORT, 478 F.2D 203, 210 (3RD CIR. 1973).[14] THIS "POSSIBLE CONFLICT" TEST IS USED BECAUSE "THE RIGHT TO HAVE ASSISTANCE OF COUNSEL IS TOO FUNDAMENTAL AND ABSOLUTE TO ALLOW COURTS TO INDULGE IN NICE CALCULATIONS AS TO THE AMOUNT OF PREJUDICE ARISING FROM ITS DENIAL." UNITED STATES

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[14] SEE ALSO UNITED STATES V. RISPO, SUPRA, AT 1102; UNITED STATES V. RISPO, 460 F.2D 965, 970 (3RD CIR. 1972); UNITED STATES EX REL. SMALL V. RUNDLE, SUPRA, AT 237-38; WALKER V. UNITED STATES, SUPRA. AT 375; BOEHMER V. UNITED STATES, 414 F. SUPP. 766, 770 (E.D. PA. 1976); UNITED STATES EX REL. MORGAN V. KEVE, 425 F. SUPP. 585, 587 (D.C. DEL. 1976); UNITED STATES EX REL. CLARK V. GUY, 386 F. SUPP. 1175, 1176 (E.D. PA. 1975); UNITED STATES EX REL. SMITH V. STATE. 341 F. SUPP. 268, 271 (D.C. N.J. 1972).

EX REL. HORTA V. DEYOUNG, SUPRA. AT 809, QUOTING GLASER V. UNITED STATES, SUPRA. AT 76.[15] (EMPHASIS ADDED.)

TO SEE WHETHER THERE WAS A "SHOWING OF POSSIBLE CONFLICT", THE COURT SHOULD LOOK AT THE RECORD AND ASK "WHETHER OR NOT SEPARATE REPRESENTATION MIGHT HAVE MADE A DIFFERENCE IN PETITIONER'S CHOICE OF DEFENSE STRATEGY THAT MIGHT HAVE DIFFERENTIATED (DEFENDANT'S) POSITION FROM THAT OF (HIS) CO-DEFENDANT." UNITED STATES EX REL. MORGAN V. KEVE, SUPRA. AT 589; UNITED STATES EX REL. HORTA V. DEYOUNG. SUPRA. AT 809. THE TRIAL DEFENSE SHOULD BE EXAMINED AND ANY PLACES WHERE SEPARATE COUNSEL, WITHOUT POSSIBLE CONFLICTING DUTIES, COULD HAVE TAKEN MORE SUCCESSFUL "TACK" THAN WAS TAKEN BY JOINT COUNSEL SHOULD BE IDENTIFIED. UNITED STATES EX REL. MORGAN V. KEVE, ID. SEE ALSO UNITED STATES EX REL. HORTA V. DEYOUNG, SUPRA. AT 809. ANY CLAIMS OF CONFLICT OF INTEREST MUST BE BASED ON SOME FORM OF FACTUAL SUPPORT. BOEHMER V. UNITED STATES, SUPRA. AT 770. BECAUSE THE RESOLUTION WHETHER A CONFLICT OF

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15 THE TEST FOR POSSIBLE CONFLICTS OF INTEREST MUST BE MADE IN LIGHT OF THE NORMAL COMPETENCY STANDARD FOR ADEQUATE REPRESENTATION. UNITED STATES EX REL. HART V. DAVENPORT, SUPRA. AT 210; UNITED STATES EX REL. GREEN V. RUNDLE, 434 F.2D 1112, 1113 (3RD CIR. 1970); MOORE V. UNITED STATES, 432 F.2D 730, 737 (3RD CIR. 1970); UNITED STATES EX REL. CLARK V. GUY, 386 F. SUPP. 1175, 1177 (E.D. PA. 1974). BOTH THE STATE AND FEDERAL STANDARDS FOR THE REQUIREMENT OF NORMAL COMPETENCY ARE THE SAME, AND THE ULTIMATE ISSUE IS NOT WHETHER A DEFENDANT WAS PREJUDICED BY HIS COUNSEL'S ACT OR OMISSION, BUT WHETHER COUNSEL'S PERFORMANCE WAS AT THE LEVEL OF NORMAL COMPETENCY." MOORE V. UNITED STATES, 423 F.2D 730, 737 (3RD CIR. 1970). SEE ALSO UNITED STATES EX REL. GREEN V. RUNDLE, SUPRA. AT 1113. NORMAL COMPETENCY INCLUDES SUCH ADHERENCE TO ETHICAL STANDARDS WITH RESPECT TO AVOIDANCE OF CONFLICTING INTERESTS AS IS GENERALLY EXPECTED FROM THE BAR, UNITED STATES EX REL. HART V. DAVENPORT, SUPRA. AT 210, INCLUDING ADHERENCE TO CANON 5. UNITED STATES EX REL. CLARK V. GUY, SUPRA. AT 1177.

INTEREST, OR A POSSIBILITY OF THE SAME, WAS EVIDENCED VIA THE EVEN PARTIAL DUALITY IS DEPENDENT ON THE CIRCUMSTANCES AS A WHOLE, IT IS NECESSARY THAT THE TRIAL AND POST-CONVICTION HEARING RECORDS BE EXAMINED FULLY, INCLUDING ANY STATEMENTS MADE DURING THESE PROCEEDINGS BY EITHER JUDGE DIBONA OR MR. PERUTO.

RELATOR'S ALLEGATIONS OF INEFFECTIVENESS OF COUNSEL CENTER ON COUNSELS' REFUSAL TO PERMIT RELATOR TO TESTIFY ON HIS OWN BEHALF AND ON THEIR DECISION NOT TO PRESENT ANY EVIDENCE AND THUS WE MUST LOOK FIRST TO THE RECORDS TO DETERMINE WHETHER THEY OFFER FACTUAL SUPPORT FOR SUCH CONTENTIONS. THERE ARE NUMEROUS INSTANCES OF SUCH A POSSIBILITY OF CONFLICT EVIDENCED HERE, WHETHER THE DECISION FOR RELATOR NOT TO TESTIFY MAY HAVE NOT BEEN TRULY HIS OWN, BUT RATHER MADE BY THE TWO ATTORNEYS. FOR EXAMPLE, SULLIVAN CONTENDS THAT HE WANTED TO TESTIFY AND THAT HE COMMUNICATED THIS TO HIS ATTORNEYS. (N.T. POST-CONVICTION, MARCH 25, 1974, P. 155). CARCHIDI SUPPORTS SULLIVAN'S MEMORY ON THIS POINT. (N.T. POST-CONVICTION, AUGUST 6, 1974, P. 83.) ADDITIONALLY, ON SULLIVAN'S CROSS-EXAMINATION, THE FOLLOWING EXCHANGE TOOK PLACE:

> "Q. NOW YOU INDICATE THAT YOU WANTED TO TESTIFY.
>
> A. YES, SIR.
>
> Q. AND WHO MADE THE FINAL DECISION, WHICH OF THE THREE OF YOU? (SULLIVAN, MR. PERUTO, OR JUDGE DIBONA).
>
> A. I HAD NOTHING TO DO WITH THE DECISION. IT WAS GIVEN TO ME POINT BLANK. AND MR. PERUTO, AFTER LIKE I SAY HOURS OF DISCUSSION, MR. PERUTO SAID SOMETHING TO THE EFFECT OF, 'LOOK, WE'RE THE ATTORNEYS.

> YOU DON'T KNOW ANYTHING ABOUT LAW'-- I'M NOT QUOTING HIM VERBATIM, I'M USING MY OWN LANGUAGE -- AND YOUR LIFE IS IN MY HANDS AND WE'RE OUT TO PROTECT IT, AND YOU'RE NOT TO WORRY, THAT YOU'LL BE ACQUITTED AND WE'RE ASSURED THAT YOU'LL BE ACQUITTED. AND I SAID, 'LOOK, YOU GOT IT, YOU GOT THE BALL, CARRY IT'." (N.T. POST-CONVICTION, MARCH 25, 1974, P. 196.)

MR. PERUTO'S RECOLLECTION OF HOW THE DECISION WAS MADE FOR RELATOR NOT TO TESTIFY WAS BROUGHT OUT ON HIS DIRECT EXAMINATION:

> "Q. WELL, I WANT TO KNOW IF IT WAS YOU WHO URGED HIM NOT TO TESTIFY.
>
> MR. LUNKENHEIMER: IF ANYONE.
>
> MR. MORAN: IF ANYONE, NATURALLY.
>
> THE WITNESS: SINCE I DON'T RECALL, I'LL PUT IT THIS WAY: WHICH OF THE TWO OF US URGED HIM TO TESTIFY OR DID NOT, OR WHETHER I DID IT AS A RESULT OF BEING SORT OF A DEVIL'S ADVOCATE -- I REPRESENT HIM REGULARLY, JUDGE -- I WOULD SAY THAT I WOULD ACCEPT JUDGE DIBONA'S RECOLLECTION. AND IT DOES SEEM TO MY RECOLLECTION MORE IN KEEPING WITH WHAT I WOULD HAVE DONE <u>BECAUSE OF THE OTHER TWO DEFENDANTS YET TO TESTIFY</u>." (N.T. POST-CONVICTION, APRIL 25, 1974, P. 102-104.) (EMPHASIS ADDED.)

ALTHOUGH JUDGE DIBONA ACKNOWLEDGES THAT SHORTLY AFTER MR. PERUTO URGED RELATOR NOT TO TESTIFY THAT SULLIVAN MADE THE DECISION NOT TO DO SO. (N.T. POST-CONVICTION, MAY 15, 1974, P. 16). HE CLAIMS THAT HE FELT THAT SULLIVAN SHOULD TESTIFY AND THAT RELATOR WAS THE ONE WHO HIMSELF MADE THE OPPOSITE DECISION. (N.T. POST-CONVICTION, APRIL 25, 1974, P. 19-20). ON THE BASIS OF THESE DISPUTED FACTS, THE SUPREME COURT HELD THAT MR. DIBONA'S DECISIONS ON NOT ALLOWING RELATOR TO TESTIFY ON HIS OWN BEHALF WERE TACTICAL ONLY. 371 A.2D AT 487.

IN HIS OPINION, AFTER THE POST-CONVICTION HEARING, JUDGE DOTY FOUND AT PAGE 8 THAT:

> "JUDGE DIBONA TESTIFIED THAT THE DEFENDANT WAS FULLY CONSULTED CONCERNING HIS RIGHT TO TESTIFY AND THAT THE DECISION OF DEFENDANT NOT TO TESTIFY WAS MADE JOINTLY BY COUNSEL AND THE CLIENT. WE SEE NO QUESTION OF INEFFECTIVE ASSISTANCE OF COUNSEL HERE."

AGAIN, FEDERAL COURTS ARE NOT BOUND BY SUCH CONCLUSIONS UNLESS SUPPORTED FACTUALLY ON THE RECORD, AND THERE HAS BEEN AMPLE TESTIMONY HERETOFORE TO SHOW THAT JUDGE DOTY DID NOT CONSIDER ALL OF THE EVIDENCE PRESENTED FROM THE POST-CONVICTION RECORD FULLY ENOUGH TO ADEQUATELY SUPPORT HIS FINDING ON THIS ISSUE.

THEREFORE, THE DECISION WHETHER OR NOT SULLIVAN SHOULD TESTIFY ON HIS OWN BEHALF MAY NOT HAVE BEEN MADE SOLELY BY HIM. RATHER, THERE IS A PREPONDERANCE OF EVIDENCE TO SUPPORT THE INFERENCE THAT THE TWO ATTORNEYS, EITHER SINGULARLY OR IN CONSORT, AT THE VERY LEAST <u>INFLUENCED</u> RELATOR'S CHOICE, IF THEY DID NOT ACTUALLY MAKE SUCH DECISION ON THEIR OWN. BECAUSE THERE IS AT LEAST A <u>POSSIBILITY</u> THAT EITHER MR. PERUTO OR JUDGE DIBONA WERE BURDENED BY A CONFLICT OF INTEREST AT THE TIME SUCH DECISION WAS MADE, INEFFECTIVE ASSISTANCE OF COUNSEL HAS BEEN DEMONSTRATED.

ON THE ISSUE OF WHETHER COUNSELS' DECISION NOT TO PRESENT ANY EVIDENCE WAS BURDENED WITH A POSSIBILITY OF CONFLICT, RELATOR ALLEGES THAT HAD COUNSELS' DECISIONS BEEN BASED ON AN UNFETTERED AND UNDIVIDED ASSESSMENT OF HIS BEST INTERESTS, SEVERAL PIECES

OF EVIDENCE MIGHT HAVE BEEN BROUGHT FORTH AT TRIAL. HE CONTENDS THAT THEIR DECISION WAS BASED ON THE CONSIDERATION NOT TO REVEAL THE DEFENSE STRATEGY TO BE USED IN THE TRIAL OF HIS CO-DEFENDANTS. THE SUPREME COURT FOUND JUDGE DIBONA'S DECISION ON THIS ISSUE AGAIN TO BE TACTICAL ONLY, AND NOT THE RESULT OF ANY DUAL REPRESENTATION:

> "IN THE INSTANT CASE, JUDGE DIBONA BELIEVED THAT THERE WAS INSUFFICIENT EVIDENCE UPON WHICH TO CONVICT SULLIVAN. HE THEREFORE REFRAINED FROM CALLING ANY DEFENSE WITNESSES TO AVOID THE POSSIBILITY OF EXPOSING THEM TO CROSS-EXAMINATION THROUGH WHICH THE PROSECUTION MIGHT HAVE EXTRACTED THOSE ELEMENTS NECESSARY TO COMPLETE THEIR PROOF....IN VIEW OF THE CLOSE QUESTION OF THE SUFFICIENCY OF THE EVIDENCE ON THIS RECORD, WE FIND THAT THE COURSE CHOSEN BY JUDGE DIBONA COULD NOT BE TERMED UNREASONABLE." 371 A.2D AT 487.

THE MOST CONCRETE TESTIMONY INDICATING THAT SUCH FACTUAL DETERMINATION IS UNSUPPORTED BY THE RECORD IS EVIDENCED BY MR. PERUTO'S TESTIMONY WHEN HE SAID:

> "Q. WELL, AT ANY RATE YOU HAD MADE A DECISION NOT TO PRESENT ANY TESTIMONY ANYWAY, HADN'T YOU?
>
> A. IN THE SULLIVAN TRIAL?
>
> Q. THE SULLIVAN CASE, YES.
>
> A. YES. I CAN RECALL THE GREAT DISCUSSIONS THAT WE HAD WITH SULLIVAN WHERE WE WERE SO CONVINCED THAT -- AND WE COMMUNICATED THIS TO SULLIVAN --
>
> THE COURT: WHEN YOU SAY GREAT DISCUSSION, YOU MEAN LENGTHY DISCUSSION?

> THE WITNESS: LENGTHY DISCUSSION, YES, SIR. WHERE WE FELT THAT HE COULDN'T POSSIBLY BE CONVICTED AND, THEREFORE, WHAT'S THE SENSE IN EXPOSING THE DEFENSE BECAUSE WE HAD TWO MORE DEFENDANTS TO TRY.
>
> BY MR. MORAN:
>
> Q. WAIT --
>
> A. AND I'M AFRAID SULLIVAN SUFFERED BY THAT FACT.
>
> Q. WAIT JUST A MINUTE, SIR. YOU WERE CONCERNED WITH THE OTHER TWO DEFENDANTS YOU REPRESENTED; IS THAT CORRECT?
>
> A. YES. WHY EXPOSE YOUR DEFENSE IF YOU'VE GOT TWO MORE PEOPLE TO COME TO TRIAL AND THE COMMONWEALTH HAS NOT PRESENTED A CASE?
>
> Q. SO THAT ENTERED INTO YOUR CONSIDERATION AS TO WHETHER OR NOT YOU PRESENTED A DEFENSE IN THE SULLIVAN CASE?
>
> A. SURE, IT DID. WHEN WE'RE TALKING ABOUT BACK AND FORTH. FOR EXAMPLE, I'VE HEARD JUDGE DIBONA TESTIFY TODAY, AND, YES, WE WERE SORT OF PLAYING DEVIL'S ADVOCATE. I DIDN'T WANT THE DEFENSE TO GO ON BECAUSE I THOUGHT WE WOULD ONLY BE EXPOSING THE DEFENDANT WITNESSES FOR THE OTHER TWO TRIALS THAT WERE COMING UP. NOW ON THE OTHER HAND, YOU SEE, THE THREE DEFENDANTS HAD ALREADY DECIDED BETWEEN THEMSELVES WHICH OF US THEY WANTED TO BE CHIEF COUNSEL. JOHN SULLIVAN PICKED FRED DIBONA, THE OTHER TWO DEFENDANTS PICKED ME. SO CERTAINLY I HAD TO BE CHIEF COUNSEL AND FACE THE TRIAL OF THE OTHER TWO MEN. AND AS I LOOK BACK ON THAT, ALTHOUGH IT WAS NOT MY THOUGHT THAT JOHN SULLIVAN SHOULD BE SHORT-CHANGED IN ANY FASHION, I'M AFRAID THAT IT WAS MY THOUGHT THAT I WAS OVER-SOLICITOUS FOR THE OTHER TWO DEFENDANTS BEING READY TO BE TRIED." (N.T. POST-CONVICTION, APRIL 24, 1974, P 100-102.) (EMPHASIS ADDED.)

ADDITIONALLY, RELATOR POINTS TO SEVERAL PIECES OF EVIDENCE WHICH MAY HAVE BEEN ADDUCED AT TRIAL HAD COUNSELS' LOYALTIES BEEN UNDIVDED. FIRST, MICHAEL HESSION COULD ALLEGEDLY HAVE

TESTIFIED AT THE TRIAL TO CONTRADICT THE COMMONWEALTH'S MAJOR WITNESS, FRANCIS MCGRATH, AS MR. HESSION DID AT THE TRIALS OF RELATOR'S CO-DEFENDANTS. JUDGE DIBONA CONTENDS THAT HESSION WOULD NOT TESTIFY FOR SULLIVAN BECAUSE OF THE POWER PLAY IN THE UNION HIERARCHY. (N.T. POST-CONVICTION, APRIL 25, 1974, P. 99-100.) JUDGE DIBONA KNEW OF HESSIAN AND HE STATED THAT "WE DISCUSSED WITH MR. HESSIAN AT THAT TIME, MR. PERUTO AND I DID, DURING THE COURSE OF THE TRIAL HIS BEING A WITNESS. WE CONCLUDED THAT HE WOULD BE OF NO VALUE TO US AS A WITNESS...AND BASED ON THAT WE MADE A TACTICAL DECISION THAT THERE'D BE NO SENSE CALLING HIM." (N.T. POST-CONVICTION, APRIL 25, 1974, P. 20-21.) (EMPHASIS ADDED.) AGAIN WE ARE CONFRONTED WITH THE FACT THAT JUDGE DIBONA'S ANALYSIS OF THE ISSUES WAS NOT HIS SOLE CRITERION ON WHICH HE BASED HIS TACTICAL DECISIONS: MR. PERUTO'S IDEAS CERTAINLY APPEAR TO HAVE CARRIED SOME WEIGHT, IF NOT EQUAL WEIGHT, IN JUDGE DIBONA'S FINAL DECISION. YET JUDGE DIBONA SAYS IT WAS HE WHO MADE THE FINAL DECISION ON THIS ISSUE. (N.T. POST-CONVICTION, APRIL 24, 1974, P. 108.)

GREGORY CARCHIDI WAS WILLING TO TESTIFY FOR SULLIVAN TO CONTRADICT SOME OF MCGRATH'S STATEMENTS. (N.T. POST-CONVICTION, AUGUST 6, 1974, P 8.) THUS, COUNSEL FOR RELATOR WAS FACED WITH DECIDING WHETHER TO USE CARCHIDI AS A WITNESS, EVEN THOUGH COUNSEL SIMULTANEOUSLY REPRESENTED CARCHIDI. AT LEAST PERUTO HAD ALREADY DECIDED NOT TO PUT CARCHIDI ON THE WITNESS STAND, AS EVIDENCED BY THIS DISCUSSION AT TRIAL:

> "PERUTO: YOU PUT ME IN THIS POSITION; A STATEMENT BY CARCHIDI OFFERED INTO EVIDENCE AND CAN ONLY BE REFUTED BY CARCHIDI.
>
> THE COURT: IT IS THE LAW BECAUSE A DEFENDANT REFUSES TO TESTIFY HE CAN'T OFFER SOMETHING.
>
> PERUTO: THE DEFENDANT CAN TESTIFY, BUT HOW CAN HE TESTIFY TO WHAT CARCHIDI SAID AND YOU CAN'T PUT CARCHIDI ON THE RECORD." (N.T. TRIAL, JUNE 13, 1967, P. 672.)

IN JUDGE DIBONA'S OPENING STATEMENT, HE TOLD THE JURY THAT HE WOULD SHOW THAT MCGRATH (ONE OF THE COMMONWEALTH'S WITNESSES) WAS MISTAKEN, AND BY IMPLICATION THE ONLY WAY HE COULD DO SO WAS BY CALLING OTHER WITNESSES TO REFUTE MCGRATH. (SEE N.T. TRIAL, P. 90-91.) RELATOR ALLEGES THAT HE WANTED COUNSEL TO CALL THESE OTHER WITNESSES, AND THAT HE REQUESTED THAT COUNSEL DO SO, TO NO AVAIL. (N.T. POST-CONVICTION, MARCH 25, 1974, P. 155-164.)

RELATOR'S RECOLLECTION OF THIS CONVERSATION IS SUPPORTED BY MR. PERUTO'S OWN TESTIMONY ON DIRECT EXAMINATION:

> "Q. DID YOU ADVISE THE DEFENDANT SULLIVAN WHEN YOU WERE CONSIDERING WHETHER OR NOT TO PUT ON A DEFENSE THAT THESE THREE WITNESSES WERE AVAILABLE AND COULD HELP THIS DEFENSE?
>
> A. I DON'T RECALL ADVISING HIM OF THAT, BUT I DO RECALL THAT I FELT THAT IT MIGHT BE DANGEROUS BECAUSE ONE OF THE OTHER TWO DEFENDANTS LEAVING IN A HURRY MIGHT HAVE BEEN SEEN BY THOSE THREE WITNESSES AND IT MIGHT HAVE DAMAGED THAT DEFENDANT AND IT MIGHT HAVE COME OUT ON THE CROSS-EXAMINATION OF THOSE WITNESSES IN SULLIVAN'S CASE.
>
> Q. (SIC) YES, SIR. AND THERE A MATTER OF JUDGMENT IN THE SENSE THAT WE FELT THAT THE ONLY THING THAT THEY HAD WAS THE MERE STATEMENT OF MCGRATH AND THAT THE CASE WOULD NOT EVEN GO TO THE JURY." (EMPHASIS ADDED.)

MOREOVER, THE BRIEF FOR APPELLANT AT 44 AND MR. PERUTO'S TESTIMONY AT THE POST-CONVICTION HEARING, APRIL 25, 1974, AT P. 107, LEND SUPPORT TO RELATOR'S ALLEGATION THAT ANOTHER WITNESS WAS AVAILABLE TO REFUTE THE COMMONWEALTH'S EVIDENCE. RELATOR WAS NEVER MADE AWARE OF MANY FACTORS WHICH COULD HAVE BEEN USED AS A DEFENSE (N.T. POST-CONVICTION, APRIL 25, 1974, P. 104-107), WHICH HE DISCOVERED AFTER THE TRIAL WAS ENDED. (N.T. POST-CONVICTION, APRIL 25, 1967, P. 165-167.)

JUDGE DIBONA'S REASON FOR NOT CALLING ANY OF THE ABOVE WITNESSES WAS THAT ONCE SULLIVAN HAD DECIDED NOT TO TESTIFY, "THERE WAS NO OTHER REAL GOOD EVIDENCE THAT WE HAD, THAT I THOUGHT SHOULD BE OFFERED." (N.T. POST-CONVICTION, APRIL 25, 1974, P. 19-20.) THERE IS THE POSSIBILITY THAT MR. PERUTO'S DECISION OR ADVICE ON THIS MATTER MAY HAVE INFLUENCED JUDGE DIBONA, BECAUSE IN FACT NONE OF THE WITNESSES WHO (SIC) RELATOR WANTED WERE EVER CALLED. IT IS MOST APPARENT FROM THE TESTIMONY QUOTED ABOVE THAT AT LEAST MR. PERUTO HAD DIVIDED LOYALTY BETWEEN RELATOR AND THE TWO CO-DEFENDANTS WHOM MR. PERUTO ALLEGEDLY REPRESENTED AS LEAD COUNSEL.

WE ARE THUS OBLIGED TO SPECULATE WHETHER OR NOT INDEPENDENT COUNSEL WOULD HAVE PERMITTED THESE WITNESSES, SEVERAL OF WHOM ARE SINCE DECEASED, TO TESTIFY IN BEHALF OF RELATOR. ALTHOUGH THIS IS NOT ANY EASY SPECULATION, IT IS APPARENT THAT THE FINAL DECISION ON THESE MATTERS WAS NOT ENTIRELY THAT OF JUDGE DIBONA,

BUT RATHER WAS MADE AT LEAST IN PART BY MR. PERUTO. IT SHOULD BE NOTED THAT AT THE CONCLUSION OF THE COMMONWEALTH'S CASE, MR. PERUTO STATED: "MR. DIBONA HAS ENTRUSTED THE DEFENSE TO ME AND THE DEFENSE RESTS." (N.T. TRIAL, JUNE 16, 1967, P. 1128.) (EMPHASIS ADDED.) ALTHOUGH WE ARE UNSURE OF WHO CARCHIDI'S "MAIN" COUNSEL WAS, EVERYONE AGREES THAT MR. PERUTO FUNCTIONED AS THE PRINCIPAL COUNSEL FOR DIPASQUALE.

MR. PERUTO'S CONCERN FOR HIS OTHER CLIENTS, COMBINED WITH HIS ACTIVE PARTICIPATION THROUGHOUT THE COURSE OF RELATOR'S TRIAL AND THE ENTRUSTING TO HIM OF RELATOR'S DEFENSE, LEAVES ME NO CHOICE BUT TO CONCLUDE THAT THERE WAS AT LEAST A POSSIBILITY OF CONFLICT OF INTEREST IN THE DUAL REPRESENTATION. RELATOR'S CONVICTION UNDER THESE CIRCUMSTANCES CARRIES WITH IT SUCH A POTENTIAL FOR INVASION OF CONSTITUTIONAL RIGHTS THAT (SIC) SHOULD BE VACATED.

THE COURT IS NOT UNMINDFUL THAT UNDER OUR SYSTEM, THE ADMINISTRATION OF CRIMINAL JUSTICE IS GENERALLY COMMITTED TO THE SEVERAL STATES; THAT DUE PROCESS OF LAW "IS NOT TO BE TURNED INTO A DESTRUCTIVE DOGMA AGAINST THE STATES IN THE ADMINISTRATION OF THE SYSTEMS OF CRIMINAL JUSTICE." ROCHIN V. PEOPLE OF CALIFORNIA, SUPRA; THAT IN THE ENFORCEMENT OF THEIR CRIMINAL LAWS, STATES HAVE COMPREHENSIVE RIGHTS IN FASHIONING THEIR OWN RULES. KNAPP V. SCHWEITZER, 357 U.S. 371, REHEARING DENIED 358 U.S. 860 (1958). HOWEVER, THIS COURT IN REVIEWING APPLICATION FOR HABEAS CORPUS RELIEF TOO HAS ITS RESPONSIBILITY. REGARD FOR

REQUIREMENTS OF THE DUE PROCESS CLAUSE "INESCAPABLY IMPOSES ON THIS COURT AN EXERCISE OF JUDGMENT UPON THE WHOLE COURSE OF THE PROCEEDINGS (RESULTING IN A CONVICTION) IN ORDER TO ASCERTAIN WHETHER THEY OFFEND THE CANNONS (SIC) OF DECENCY AND FAIRNESS.... EVEN TOWARDS THOSE CHARGED WITH THE MOST HEINOUS OFFENSES." MALINSKI v. NEW YORK, 324 U.S. 401 AT 416-417.

FOR THE FOREGOING REASONS, RELATOR'S CONVICTION OF FIRST DEGREE MURDER WAS NOT ATTENDED BY THE FUNDAMENTAL FAIRNESS REQUIRED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION. IT CANNOT STAND AND THE WRIT MUST ISSUE.

ACCORDINGLY, I MAKE THE FOLLOWING:

RECOMMENDATION

NOW, THIS 3RD DAY OF NOVEMBER, 1977, IT IS RESPECTFULLY RECOMMENDED THAT RELATOR'S PETITION FOR A WRIT OF HABEAS CORPUS BE GRANTED, AND THAT THE EXECUTION OF THE WRIT BE STAYED FOR A PERIOD OF SIXTY (60) DAYS FROM THE DATE OF THE ORDER OF THE COURT TO GIVE THE COMMONWEALTH AN OPPORTUNITY TO APPEAL AS PROVIDED BY LAW, OR TO RELIST THE BILL OF INDICTMENT FOR A SPEEDY TRIAL.

/s/ EDWIN E. NAYTHONS
UNITED STATES MAGISTRATE

APPENDIX D COMMONWEALTH OF PENNSYLVANIA

V.

SULLIVAN

has not been reprinted. It can be found at 371 A.2d 468.

APPENDIX E COMMONWEALTH OF PENNSYLVANIA

V.

SULLIVAN

has not been reprinted. It can be found at 446 Pa. 419.

APPENDIX F

Opinion of the Court of Common Pleas Denying Post Conviction Relief

OPINION

DOTY, A.J.

This matter is before the court for consideration of defendant's Petition for Relief under the Post Conviction Hearing Act 19 P.S. 1180-1 et seq. Several evidentiary hearings were held at which time defendant was represented by counsel other than his trial counsel. After a careful consideration of the extensive record in this case, including the testimony taken before us, oral argument presented, briefs filed and the applicable law, we are convinced that defendant's petition must be granted in part and denied in part.

A factual background which gave rise to this case has been set forth by the Pennsylvania Supreme Court in its opinion dated December 29, 1971. Commonwealth vs. Sullivan, 446, Pa. 419 (1971).[1] Succinctly stated, the defendant was convicted following a trial before the Honorable Alexander F. Barbieri and a jury of the crime of first degree murder in the deaths of Rita Janda and John Gorey. Following the filing and denial of post trial motions by a court en banc, a direct

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[1] In view of our comments which follow, there may be some discrepancies argued by counsel concerning the factual situation, but the short summary in the prior report will suffice for the purpose of this opinion.

appeal was filed on September 6, 1968 and certiorari from the Supreme Court was filed on September 10, 1968. As stated hereinabove, this case was decided by the Pennsylvania Supreme Court on December 29, 1971. The judgment of sentence was therein affirmed by an evenly divided court, one justice taking no part in the consideration or decision of this case.

On January 10, 1972, a petition for rehearing was filed with the Pennsylvania Supreme Court and on February 22, 1972 that petition for rehearing was denied. This is the first petition filed by defendant under the Post Conviction Hearing Act.

Although motions for new trial and motions in arrest of judgment were heard before a three judge court en banc in the court below, one of defendant's two counsel, G. Fred DiBona, Esquire, was appointed a Judge of the Court of Common Pleas of Philadelphia (April, 1969) prior to further proceedings on appeal. After Mr. (now Judge) DiBona's appointment to the bench, there was considerable confusion concerning the ongoing representation of defendant. Judge DiBona testified in the evidentiary hearing before us that he did not file a brief in the Supreme Court. He stated that a rough draft of the brief had been prepared but he had no knowledge of a brief ever being filed. Nor did he have any conversation with the defendant as to the waiving of oral argument in the Supreme

COURT. A. CHARLES PERUTO, ESQUIRE, DEFENDANT'S CO-COUNSEL, TESTIFIED BEFORE US THAT JUDGE DIBONA WAS CHIEF COUNSEL IN THE CASE. HE STATED THAT THERE WAS SOME QUESTION ABOUT SUBMITTING THE CASE TO THE SUPREME COURT ON BRIEFS BUT IT WAS HIS RECOLLECTION THAT HE NEVER WROTE A BRIEF AND HE DOES NOT RECALL FILING AN APPEAL IN THE SUPREME COURT. PARENTHETICALLY, HOWEVER, WE DO NOTE THAT THE OFFICIAL SUPREME COURT REPORT OF THIS CASE DOES INDICATE MR. PERUTO'S APPEARANCE FOR THE DEFENDANT. IN ADDITION, FOOTNOTE NO. 1 ON PAGE 423, OF THE SUPREME COURT'S OPINION INDICATES THAT A BRIEF WAS FILED BY "COURT-APPOINTED COUNSEL" AS WELL AS THE APPELLANT IN PROPRIA PERSONA.

JAMES D. CRAWFORD, ESQUIRE, FORMERLY CHIEF OF THE APPEALS DIVISION OF THE DISTRICT ATTORNEY'S OFFICE TESTIFIED THAT HE HAD A CONVERSATION WITH MR. PERUTO WHO SAID HE WOULD BE INTERESTED IN SUBMITTING THE CASE ON BRIEFS, (WITHOUT ORAL ARGUMENT). MR. CRAWFORD FURTHER STATED THAT WHILE MOST DIRECT APPEALS IN FIRST DEGREE MURDER CASES HAVE ORAL ARGUMENT, MR. PERUTO TOLD HIM THAT HE WAS VERY BUSY AND THAT THE MATTER MIGHT BE SUBMITTED ON BRIEFS. HE ALSO STATED THAT MR. PERUTO'S OFFICE SENT OVER A BRIEF TO THE SUPREME COURT BUT HE DID NOT KNOW WHO ACTUALLY DELIVERED IT TO THE SUPREME COURT. IN ADDITION, DEFENDANT APPARENTLY FILED A PRO SE BRIEF ON HIS OWN, ALTHOUGH THERE IS NO TESTIMONY THAT DEFENDANT WAS EVER TRAINED

IN THE LAW. IT IS TO BE NOTED THAT MR. CRAWFORD FURTHER TESTIFIED THAT HIS BRIEF WAS NOT FILED UNTIL SEVEN MONTHS AFTER THE FILING OF THE APPEAL.

AT THE EVIDENTIARY HEARING BEFORE US, MR. PERUTO TESTIFIED THAT TO THE BEST OF HIS RECOLLECTION HE NEVER PRESENTED ANY ORAL ARGUMENT TO THE SUPREME COURT. HE FURTHER TESTIFIED THAT HE HAD ABSOLUTELY NO RECOLLECTION OF FILING A BRIEF WITH THE SUPREME COURT. ON THE CONTRARY, HE STATED THAT WHILE JUDGE DIBONA'S OFFICE MAY HAVE FINALIZED A DRAFT ON A BRIEF AND FILED IT WITH THE SUPREME COURT, HE, MR. PERUTO, WAS CERTAIN THAT HE HIMSELF NEVER FILED SUCH A BRIEF. WHEN ASKED BY DEFENDANT'S COUNSEL AT THE EVIDENTIARY HEARING THE FOLLOWING:

> Q. SO YOU NEVER FILED A BRIEF, AND I SUPPOSE YOU NEVER ORALLY ARGUED THE CASE BEFORE THE SUPREME COURT?

MR. PERUTO ANSWERED:

> A. I NEVER DID ANYTHING FOR JOHN SULLIVAN, WHICH WILL GO DOWN TO THE DAY I DIE, BECAUSE I, TOO, FELT THAT IT WAS THE WORST CASE IN MY LIFE OF AN UNFAIR CONVICTION.

DEFENDANT TESTIFIED (PAGE 232, PCHA, N.T.) THAT MR. PERUTO CAME TO SEE HIM AND SAID THAT THEY WERE GOING TO "PUT THE APPEALS IN". HE SAID, "CHUCK, DON'T FORGET, I WANT YOU TO ARGUE THIS CASE" AND MR. PERUTO REPLIED, "I DON'T FEEL THAT I SHOULD ARGUE THE CASE". HE FURTHER TESTIFIED THAT HE DID NOT CONSENT TO WAIVER OF ORAL ARGUMENT BUT THAT MR. PERUTO SAID "DON'T WORRY ABOUT IT" AND WALKED OUT.

A CAREFUL CONSIDERATION OF ALL THE TESTIMONY CONCERNING DEFENDANT'S APPELLATE RIGHTS CLEARLY INDICATES THAT ORAL ARGUMENT WAS NOT WAIVED BY DEFENDANT AND THAT THERE WAS CONSIDERABLE CONFUSION BETWEEN COUNSEL CONCERNING THE APPEAL DUE TO JUDGE DIBONA'S APPOINTMENT TO THE BENCH AND MR. PERUTO'S HEAVY TRIAL SCHEDULE. IN A MATTER INVOLVING A CONVICTION FOR FIRST DEGREE MURDER, IT IS OUR OPINION THAT DEFENDANT'S RIGHTS SHOULD HAVE BEEN FULLY PROTECTED AND EVERY POSSIBLE ARGUMENT FULLY EXPLORED. WE CANNOT SAY THAT THIS WAS DONE IN THIS CASE.

ARTICLE I, §9, OF THE PENNSYLVANIA CONSTITUTION PROVIDES THAT IN ALL CRIMINAL PROSECUTIONS THE ACCUSED HAS THE RIGHT TO BE HEARD BY HIMSELF AND HIS COUNSEL. WE TAKE THIS TO INCLUDE NOT ONLY TRIAL BUT ALSO IN THE SUBSEQUENT PROCEEDINGS. SEE, STEWART VS. COMMONWEALTH, 117 PA. 378, 381; COMMONWEALTH VS. MCNAIR, 208 PA. SUPERIOR COURT, 369 (1966).

WE ARE MINDFUL OF THE FACT THAT THE SUPREME COURT DIVIDED EVENLY IN ITS DECISION IN THIS CASE. ORAL ARGUMENT MIGHT HAVE PERSUADED A DIFFERENT DECISION. FURTHERMORE, DEFENDANT WAS ENTITLED TO A CAREFULLY PREPARED BRIEF BY HIS COUNSEL SO THAT HIS ARGUMENT COULD BE FULLY PRESENTED AND IT DOES NOT APPEAR THAT THAT WAS DONE IN THIS CASE. TO THIS EXTENT WE FIND AS A FACT THAT THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL AND THAT THIS REQUIRES GRANTING DEFENDANT RELIEF.

IN THE INSTANT PETITION DEFENDANT HAS RAISED A NUMBER OF OTHER CONTENTIONS WHICH CAN BE ARGUED ON APPEAL. HOWEVER, THERE ARE SEVERAL MATTERS WHICH DESERVE OUR FURTHER ATTENTION.

1. DEFENDANT CONTENDS THAT A SECRET MEMORANDUM WAS PRESENTED TO THE TRIAL JUDGE BY THE DISTRICT ATTORNEY AND THAT THIS MEMORANDUM WAS NOT DISCLOSED TO DEFENSE COUNSEL. JUDGE BARBIERI TESTIFIED THAT HE DID HAVE SOME RECOLLECTION OF A MEMORANDUM PRESENTED BY RICHARD A. SPRAGUE, FIRST ASSISTANT DISTRICT ATTORNEY, BUT THAT THIS MEMORANDUM HAD NO REAL BEARING ON THE CASE. THIS COMMUNICATION CONCERNED THE FINDING OF CERTAIN GUNS WHICH WERE NOT USED IN THIS CASE. IT DOES NOT APPEAR TO US THAT THIS HAD ANY EFFECT ON THE TRIAL JUDGE'S RULING AND FURTHERMORE, THE JURY WAS NOT INFORMED OF THE COMMUNICATION NOR THE CONTENTS OF IT. A CAREFUL READING OF THE RECORD INDICATES NO PREJUDICE TO THE DEFENDANT ON THIS GROUND.

2. DEFENDANT CHARGES THAT THE TRIAL JUDGE INDICATED TO HIS TRIAL COUNSEL THAT HE DID NOT THINK DEFENDANT WOULD BE FOUND GUILTY AND THAT THE TRIAL JUDGE'S RULINGS FAVORED THE COMMONWEALTH. THERE IS NOTHING IN THE RECORD TO SUBSTANTIATE SUCH A CONTENTION NOR DO THE TRIAL JUDGE'S RULINGS INDICATE THAT THIS WAS THE CASE. JUDGE BARBIERI TESTIFIED THAT HE NEVER INDICATED TO DEFENSE COUNSEL THAT HE THOUGHT DEFENDANT WOULD BE ACQUITTED. FURTHERMORE, IT MUST BE BORNE IN MIND THAT THIS WAS A JURY TRIAL AND THE JURY HAD THE ULTIMATE DECISION IN THIS CASE. ABSOLUTELY NOTHING IN THE RECORD INDICATES THAT THE JURY WAS INFLUENCED IMPROPERLY.

3. Defendant objects to the admission of color slides at trial. Admission of color slides was discussed at length by the Supreme Court in its prior opinions and if the defendant is granted re-argument it can be re-considered by the Supreme Court.

4. Alleges errors in the trial judge's charge: this is also a matter for argument before the Supreme Court.

5. Failure of the defendant to take the witness stand. Judge DiBona testified that the defendant was fully consulted concerning his right to testify and that the decision of defendant not to testify was made jointly by counsel and the client. We see no question of ineffective assistance of counsel here.

6. Sufficiency of the evidence. The defendant also contends that he is entitled to relief in these proceedings because the evidence was insufficient as a matter of law to sustain his conviction. This contention was the subject of extended discussion by the Pennsylvania Supreme Court in its prior opinion. We have heard nothing in the proceedings before us which requires Post Conviction Hearing Act Relief. If this case is re-argued in the Supreme Court there may be a full argument on the question of sufficiency of the evidence.

7. After-discovered evidence: defendant contends that he had witnesses who should have been called on his behalf. It is our opinion that defendant has failed to meet the tests required for relief on this ground. See, Commonwealth vs. Schuck, 401 Pa. 222 (1960). Defendant raises a number of other contentions in proceedings before us but all of these can be covered on re-argument in the Supreme Court.

For the above reasons, we hereby enter the following:

ORDER

AND NOW, to wit, this 6th day of November, 1974, defendant is hereby granted leave, nunc pro tunc, to re-file an appeal in the Supreme Court of Pennsylvania and to file briefs and present oral argument theron; Petition for Relief under the Post Conviction Hearing Act is otherwise denied.

/s/ Ethan Allen Doty, A.J.